87-1363

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

JOHN J. KELLY, Chief State's Attorney,
LESTER J. FORST, Commissioner of Public Safety,
Petitioners,

v.

BILL WILKINSON,
JAMES FARRANDS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

WHETHER PAT-DOWN SEARCHES FOR WEAPONS CONDUCTED ON ALL PERSONS ENTERING A PUBLIC FORUM ARE REASONABLE UNDER THE FOURTH AMENDMENT WHERE THE SEARCHES (1) ARE AUTHORIZED BY A NEUTRAL AND DETACHED MAGISTRATE; (2) HAVE A PUBLIC SAFETY AND NON-INVESTIGATORY PURPOSE; (3) AFFORD THE SUBJECT AN OPPORTUNITY TO DECLINE TO ENTER THE AREA; (4) ARE SUPPORTED BY EVIDENCE ESTABLISHING A SUBSTANTIAL LIKELIHOOD THAT PERSONS IN ATTENDANCE WILL BE ARMED AND DANGEROUS; AND (5) PROTECT THE EXERCISE OF FIRST AMENDMENT RIGHTS.

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OPINIONS BELOW

The opinion of the district court rendering judgment for the respondents is reported at 639 F.Supp. 518 (D. Conn. 1986), and appears in the appendix at 1a. The memorandum of the district court on the petitioners' post judgment motions for stay and for relief from judgment is reported at 656 F.Supp. 710 (D. Conn. 1986), and appears in the appendix at 30a. The

opinion of the court of appeals is reported at 832 F.2d 1330 (2d Cir. 1987), and appears in the appendix at 37a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit was rendered on November 9, 1987. App. at 37a. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(l), 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. Respondents, leaders of the Invisible Empire, Knights of the Ku Klux Klan (hereinafter KKK), brought this civil rights action in the United States District Court for the District of Connecticut under 42 U.S.C. § 1983 claiming that their First, Fourth, and Fourteenth Amendment rights were violated when the petitioners, state officials, obtained and implemented state court orders authorizing pat-down searches for weapons of all persons attending rallies they had sponsored. The district court, Cabranes, J., agreed that the searches violated the Fourth Amendment and enjoined the practice. Because it believed that the searches, though never condemned

by any court and approved by the state courts, violated clearly established constitutional law, the district court also awarded nominal damages to the respondents. App. at 29a. On petitioner's appeal, the Court of Appeals for the Second Circuit affirmed the district court's judgment that pat-down searches were, under the circumstances, unconstitutional. It did, however, modify the injunction so as to permit magnetometer screening at all future KKK rallies. The court of appeals also reversed the district court's award of nominal damages. App. at 64a-65a. This petition followed.

2. In September of 1980, the KKK held its first rally in Connecticut in about half a century in the small, rural community of Scotland.[1] Open to the "white public," Tr. at 839-40, the rally followed by about one year a clash between a KKK faction and opposing groups in Greensboro, North Carolina in which several people were killed. Prior to the rally, Connecticut State Police (hereinafter CSP) officials learned that news of the rally prompted various individuals and groups, including the International Committee Against Racism (hereinafter INCAR), to plan counter-demonstrations at the rally site. Some of these groups had a history of violent confrontations with the KKK and the police, and information provided by an undercover agent of the United States Treasury Department indicated that INCAR members would be armed (though not with firearms) and ready to attack Klansmen. In addition, the CSP learned that KKK members intended to arm themselves, for self-defense, and that their leader, Imperial Wizard Bill Wilkinson, planned to attend with armed bodyguards. Local residents heard gunfire from the site of the rally only days before it was to take place.

Believing that Klansmen would be armed, the Governor intended to forbid the rally altogether. At the suggestion of the Chief State's Attorney, however, the Governor agreed that state and local officials should seek a state court injunction,

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[1] Unless otherwise noted, facts appearing in this statement of the case derive from the opinion of the Second Circuit.

based on the intelligence they had gathered, that would ban the possession of firearms or other dangerous weapons on one's person or in a motor vehicle within the boundaries of the Town of Scotland absent specific authorization from Scotland authorities. Tr. at 1625-30, 1636. The injunction was sought and obtained *ex parte*. It was enforced by establishing several checkpoints on main roads leading into Scotland, within the town, and just outside the rally site. Persons and motorists seeking to pass through these checkpoints were informed that they would be subject to a pat-down search if they proceeded to the rally site.[2] The searches that were conducted were not based on individualized probable cause or reasonable suspicion, though persons subjected to search were first informed that they could avoid being searched by choosing not to enter the rally area. The searches yielded seven firearms, fifty-four rounds of ammunition, forty-one knives, two swords, two machetes, five baseball bats, three pieces of pipe, eight lengths of chain, two cans of mace, three sling shots, one set of weighted knuckles, a detonator, and a number of clubs. A firearm also was discovered under the speaker's podium. Tr. at 788.

Although violence did not occur within the rally site itself, members of Citizens Against Racism, during an attempt to march to the rally, attacked people in the area outside the site with their fists, rocks, sticks and flagpoles. At least eight persons were injured as a result of the attack, during which officers heard two gunshots ring out. Tr. at 856-57, 1074-75; Ex. 19.

The next KKK rally involved in this case occurred in March, 1981, six months later, in the City of Meriden. KKK members planned to march to and from the city hall. State and local officials did not seek a state court weapons injunction or authority to search on less than probable cause.

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[2] Unlike later state court orders, the Scotland order contained no express authorization to conduct searches.

> The demonstration was attended by fifty police officers, twenty-one Klansmen, 1,500 to 2,000 spectators and press, and a substantial number of anti-Klan demonstrators. As Klan members arrived at the City Hall steps, they were attacked with rocks and bottles thrown by anti-Klan forces. A person with a bullhorn advocated violence against the Klan and the police. Fist fights broke out among various groups in the crowd, and automobile windows were smashed. As the police attempted to escort the Klan out of the area, demonstrators pelted the Klan and the police with rocks, bottles, boards, clubs, and bricks. Two people used a building block to strike [respondent] Farrands' daughter on the back. At some point during the demonstration, Klansman Clyde Dick was restrained by the police when he attempted to draw a revolver from his coat pocket. Twenty policemen, six Klansmen, and one bystander received injuries. Many of the officers were hit with rocks or bricks. One female Klan member suffered head lacerations and injuries to the skull, while another was rendered semiconscious by a blow to the head.

App. at 43a–44a.

The Klan returned to Meriden four months later. Again, the State did not seek an order barring weapons or authorizing searches. Searches of Klansmen, with their consent, produced two pistols, several ax handles, sticks, and pocket knives, which were confiscated by police. Police also disarmed a group of anti-Klan demonstrators whom they had observed gathering or carrying rocks, sticks and clubs.

This demonstration ended before it began. INCAR members began to attack KKK members, who were escorted by police, with rocks, bottles, and tin cans; fist fights broke out within the crowd. Police halted the rally and cleared the area. Three officers and one Klansman had to be treated for injuries.

These events led state officials to explore new methods for preventing violence at future rallies while preserving the

speech and associational rights of those attending. Prior to the next rally, scheduled for October 10–11, 1981 in Windham, and the twelve rallies that followed, state officials sought state court injunctions barring the carrying of firearms or other dangerous weapons on and around rally sites and permitting pat-down searches of persons attending the rally. The ban on weapons in these orders typically extended only to the demonstration sites and the immediate vicinity. The orders generally followed the language used in the Windham order, which provided:

> All persons entering the designated area will be advised of the injunction and the option of leaving the area with their weapons. Those who choose to enter the designated area will be questioned concerning their possession of weapons and, where appropriate, a frisk for weapons will be performed. All lawfully possessed weapons held pursuant to the injunction will be tagged and returned to the lawful owners upon their exit from the designated area.

App. at 45a (italics omitted).

No order was sought or rendered without service of civil process and notice on local KKK officials and a full evidentiary hearing at which evidence of the likelihood of violence at the particular rally was presented. Ex. 144 at 6; Ex. 160 at 75. State court judges also were informed of the manner in which law enforcement officials proposed to enforce the injunctions, i.e., through pat-down frisks for weapons of all persons choosing to pass through checkpoints established around the rally sites.

No major disruptions occurred at KKK demonstrations for which the state court injunctions were issued.[3] All persons

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[3] A court order was sought, but not rendered, for one rally in the small town of Canterbury. No disruption of that rally occurred, though some thirty shotguns, rifles, and handguns were observed in the hands of Klansmen and others. Ex. 148 ¶ 6.

seeking to pass established checkpoints were advised of their right to turn back and avoid the weapons pat-down. Nevertheless, the kinds of weapons confiscated by the police, even with the benefit of court orders authorizing the weapons searches, can be seen from the list of weapons seized at one rally in Danbury:

> three clubs, fifteen shells, twenty-seven knives, seven axes, a pick, two pitchforks, eleven ax or hammer handles, twenty-three arrows, two hatchets, five sheaths, four tomahawks, six machetes, two shillelaghs, four rubber hose pieces, three tear gas containers, two pellet guns, a BB gun, two spears, a lead pipe, a chain with lead weights, an Indian head club, a metal pike, a blackjack, a crossbow, a whip, a flare-launcher, and a wooden stake.

App at 47a. In addition, a machine gun and approximately thirty rifles were seized from the owner of the property used for that rally.

3. Although the respondents never appeared with counsel to contest these orders in state court, they commenced this action in federal court under 42 U.S.C. § 1983 claiming that the pat-down searches conducted pursuant to the state court orders violated their rights under the First, Fourth and Fourteenth Amendments to the United States Constitution.

The district court, Cabranes, J., rejected the due process claim and held the First Amendment issue in abeyance, but agreed that the searches violated the respondents' Fourth Amendment rights.[4] The district court's conclusion was based in large part upon the testimony of an expert witness called

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[4] The district court found unpersuasive the respondents' due process claim because it believed that the state judges never authorized pat-down searches on less than reasonable suspicion. App. at 25a. The court of appeals would not credit this conclusion, however, based on the transcripts and pleadings in the state proceedings and the uncontradicted testimony in district court. App. at 46a, 63a; Tr. at 1184, 1186-89, 1547-48, 1588, 1595-96.

by the Klan leaders at trial, Robert W. Klotz. A retired deputy chief of police in the District of Columbia, Klotz expressed his opinion that the absence of violence at rallies where court authorized searches were conducted was the result of improved crowd control techniques, as well as other measures, and that the weapons searches "were not necessary or even particularly helpful in preventing violence." App. at 12a. The district court, thus, rejected the contrary opinion of seven CSP officials, who also were trained to handle mass demonstrations and violent crowds. *See* citations in petitioners' brief before the Second Circuit at 12.

In post-judgment motions, the petitioners sought a stay of the district court's order pending appeal or, in the alternative, a modification of the injunction so as to permit at least the use of magnetometer scanning at an upcoming KKK rally. The district court denied both motions, noting that the record itself established the ineffectiveness of magnetometers in detecting the types of weapons responsible for the injuries inflicted at prior rallies. App. at 34a.

4. The Court of Appeals for the Second Circuit reversed in part. That court agreed that pat-down searches under the circumstances violated Fourth Amendment rights, but concluded that magnetometer searches would not. In so doing, it found the district court's categorical opinion on the usefulness of the pat-down searches in preventing serious violence to be without basis in the record. App. at 54a–56a. The court of appeals failed to address, however, the district court's conclusion and the opinion of CSP officials that magnetometer scanning simply would not suffice to detect weapons of the type used in violent assaults during the demonstrations.

This petition followed.

REASONS FOR GRANTING THE WRIT

This case raises an important question of first impression with far-reaching significance. It concerns the legitimate authority of government to protect citizens from the substantial likelihood of harm that has arisen when they have sought to exercise their First Amendment rights in advancing or condemning controversial political, religious and racial views. To the extent that a real risk of violence at such gatherings would deter the exercise of First Amendment rights, a proposition few would doubt, the case concerns not only the authority of government, but its obligation in a democratic society to protect the free exchange of ideas and ideologies, no matter how repugnant, in an environment free from intimidation by violence.

1. This case has great national significance

It is evident to all that we live in an increasingly dangerous society. But the danger involved in this case is different in kind from that created by the predatory crime that afflicts our streets, schools and homes. The violence in this case is not motivated by greed or passion; nor is it the product of irrational aggression. It has, rather, one object: the suppression of ideas so as to advance political ends. This type of violence is especially threatening, for it challenges both the commitment and the ability of government in a free society to protect the marketplace of ideas.[5] No constitutional right,

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[5] The object of the state court orders sought in this case was expressed by counsel at one of the pre-rally hearings:

> We are in the anomalous position of safeguarding the First Amendment speech and associational rights of those who would deprive them of others. We make it clear for the record that[,] while we hold their beliefs in contempt, we do not hold the rights that they possess as citizens under the First Amendment in contempt and will do everything in our power to implement those

(continued)

and particularly the rights of association and free speech under the First Amendment, is self-executing. Without enforcement by the executive branch, constitutional guarantees would have little meaning.

The obligation of government to implement First Amendment rights in the context of this case is not unlike other governmental responsibilities. The duty to ensure public access to courts, to protect channels of communication, to preserve the means of safe travel, to safeguard the electoral process, and to maintain the security of military and diplomatic installations rests daily upon the federal government and the governments of the states.

The means of fulfilling these various obligations cannot remain static, just as the security measures used to protect the early presidents of this Nation have not remained unchanged. As the likelihood and extent of harm and sophistication of the means for inflicting it increase, the effectiveness of the governmental response to the threat created must likewise be enhanced.

Thus, we enter courthouses and other governmental buildings today expecting to pass through some sort of security system designed to detect weapons that could be carried within. Pocketbooks, bags, briefcases are examined, where only several decades ago such precautions would be viewed as at least excessive and over-cautious. But recent violence in courtrooms and other government buildings has disproved that notion. *See McMorris v. Alioto*, 567 F.2d 897, 899-900 (9th Cir. 1978).

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[5] *(continued)*

rights. In fact, we view the security precautions that have been undertaken for the expected rally on Saturday to be in a sense an implementation of the First Amendment rights and not in any way an attempt to undermine them.

Ex. 160 at 78.

Similar measures are employed with respect to air travel, public appearances of high government officials or candidates for high office, military installations, diplomatic facilities, and legislative chambers. We have seen too much ideologically-related violence in our time to ignore the threat it poses. Naiveté would be too costly.[6]

This case questions the reasonableness of security measures employed at public gatherings where people advocate political beliefs that generate emotionally explosive responses. But the question presented could as easily relate to security precautions taken at a presidential appearance, at a diplomatic facility, or at a state capitol or courthouse. The security of any governmental or public forum that is specifically threatened with violence is implicated in this case, not just a KKK rally site in Connecticut.

Nor is the significance of the security issue raised here minimized by the Second Circuit's approval of magnetometers in this context. What that court failed to appreciate is that, as the district court expressly found, virtually all of the injuries at these gatherings were inflicted, not by firearms detectable with a magnetometer, but by other instruments, many of which could not be so detected. Magnetometers, which detect only items containing metal, provide no security against clubs, bottles, rubber hoses and rocks. *See United States v. Lopez,* 328 F.Supp. 1077, 1085 (E.D.N.Y. 1971). Other, more sophisticated weapons and certain explosives also will elude magnetometer screening. Liquid bottle bombs, fiberglass knives, plastic grenades and other plastic explosives can be made or obtained by violent political groups. *See United States v. Albarado,* 495 F.2d 799, 804 (2d Cir. 1974). These items evade magnetometer detection because they have no,

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[6] Even with enhanced security precautions, statistics continue to reflect the success ideologically-motivated criminals have. *See Public Report of The Vice President's Task Force on Combatting Terrorism* (1986); Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals,* 72 J. Crim.L. & Criminology, 1, 4-5 (1981).

or only slight, metallic content; they can evade visual inspection by being concealed beneath loose-fitting clothing. In short, the variety of dangerous weapons that can elude magnetometer screening is limited only by the ingenuity of the terrorist or violent agitator.

It is, thus, clear that resolution of the Fourth Amendment question raised by Connecticut officials in this case would aid state and federal law enforcement agencies significantly in their efforts to protect the institutions of government and the exercise of individual liberties.

2. This Court should resolve the unsettled question of federal law presented

This case raises an important but unsettled question of federal law. Twelve state court judges considered the injunctions and implementing searches to be warranted and lawful under the circumstances. The federal courts, to different extents, disagreed. The district court was of the view that the state has less of an interest in preserving public safety at political rallies than at federal courts or airports.[7] App. at 20a.

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[7] As noted above, the district court also expressed its opinion that the "searches of persons and automobiles are not necessary or even particularly helpful in preventing violence at Klan rallies in Connecticut." App. at 12a. The court of appeals pointed out that the expert's opinion, upon which the district court relied, could not support any such categorical "finding," and hence, rejected it. App. at 54a-56a.

More important than whether some expert would have lent support to the district judge's conclusion, however, is the principle that police conduct is not unconstitutional simply because its objective might have been accomplished through less intrusive means. *See Colorado v. Bertine*, 479 U.S. ____, 107 S.Ct. 738, 742 (1987); *United States v. Sharpe*, 470 U.S. 675, 687 (1985); *Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983). The inquiry, rather, is whether police acted unreasonably in adopting the means they used. *Colorado v. Bertine*, 107 S.Ct. at 742. "Monday morning quarterbacking" is as popular in assessing police conduct as it is in other areas of professional activity. But the Fourth Amendment does not call for a battle of

(continued)

The court of appeals rejected that notion and recognized the need for some, albeit limited, protection against the introduction of weapons at political rallies. State officials maintain, however, that it is demonstrably reasonable to prevent the carrying of any weapon into a public forum for the exchange of ideas when there is good reason to believe that people intend to participate with more than their voices.

Understandably cautious, the lower courts were at a loss to find any authority that would provide specific support for the searches conducted. But the first magnetometer search at an airport or governmental building brought with it no legal authority directly on point; such searches were not therefore unconstitutional.[8] *See, e.g., United States v. Albarado*, 495 F.2d at 803-4. That the government in our society may respond effectively to new and different threats of violence reveals the genius in the standard governing police conduct created by the Framers of the Fourth Amendment. That standard is a test of reasonableness that is as appropriate in the 20th century as it was in the 18th. Today's technology, available both to detect and to perpetrate crime, and the current tactics of political extremists cannot be ignored simply because they were not contemplated in the 18th century.

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[7] *(continued)*
the experts on the question of the need for security procedures. Especially is that so when the competing expert has no connection with state government and, thus, has no obligation to protect the safety of its citizens. Our federal system has not required that the judgment of state officials, who are answerable to the citizens of the state, be so lightly tossed aside.

In the absence of a showing of incompetence or subterfuge, the judgment of state officials that a policy is necessary to preserve public safety should be given deference. *Cf. Turner v. Safley*, 482 U.S. ____, 107 S.Ct. 2254, 2260-62 (1987) *and Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (prison safety).

[8] Indeed, the court of appeals acknowledged the uniqueness of the issue when it prefaced its finding that the searches were unconstitutional with the qualifying phrase, "taking into account the existing law." App. at 59a.

This Court has said that the test of reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails," and that consideration should be given to "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The district court and, to a lesser degree, the court of appeals misapplied this test. The district court failed to see the compelling need to exclude weapons from what state officials had good reason to believe would be a violent confrontation of armed, ideologically opposed groups. By focusing on alternative methods of preventing violence, such as increased police manpower, both courts did not appreciate that nearly all administrative, protective searches can be avoided by the use of increased police personnel. The fact that for one rally alone police costs, even with the benefit of the pat-down searches, amounted to $75,000.00 apparently did not influence the lower courts' assessment of reasonableness. Tr. at 1705. While the court of appeals recognized the need to exclude weapons from rally sites, it did not go on to ascertain whether magnetometers would satisfy it, and clearly they would not.

Neither court fully appreciated other features of the searches. All of the rally site searches were judicially authorized, not the product of unbridled police discretion.[9] They were conducted on everyone, and so avoided particular stigma to anyone. *Cf. United States v. Albarado*, 495 F.2d at 806 (magnetometer scanning). The orders authorizing the pat-downs were based on specific evidence, which pertained to the particular rally and established that members of ideologically

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[9] Indeed, the Second Circuit acknowledged that the state court orders "satisfied many of the concerns to which the traditional warrant requirement of the fourth amendment is directed." App. at 63a. It went on to suggest that Connecticut officials in the future seek "area search warrants," such as Justice Powell and at least five other justices of this Court identified with approval in *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 n.3, (1973), *id.*, 283-85 (Powell, J., concurring), *id.*, 288 (White, J., dissenting). The Second Circuit failed to explain, however, why the orders obtained did not in fact already satisfy the *Almeida-Sanchez* standard.

opposed groups would attend with arms intending to use them.[10] The pat-down searches were conducted, not to investigate crime, but for the public safety purpose of preventing physical injury or death to the participants and, so, to protect their First Amendment rights of association and free expression. *See Colorado v. Bertine*, 107 S.Ct. at 742 (probable cause standard is "peculiarly related to criminal investigations, not routine noncriminal procedures); *Griffin v. Wisconsin*, 483 U.S. ____, 107 S.Ct. 3164, 3167-8 (1987) (regulatory searches not subject to probable cause standard). Finally, the searches were voluntary, and so lacked the type of police control and intimidation that pat-downs in the criminal context involve. A citizen who can thumb his nose to a police search is in a far different position from one who is forced to spread eagle on the side of a road or building. *See generally* 4 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 10.7 (2d ed. 1987).

The reasonableness of these searches, under the particular circumstances of this case, becomes evident. Even if it does not, however, what does is the need for clarification of the law. The lower courts could not agree on a resolution of the matter. Existing law is concededly unclear. But the obligation of government to protect public safety and facilitate the exercise of constitutional rights in a dangerous world arises daily. Failure to give government officials guidance in this uncharted area of Fourth Amendment law may exact a price, whether in public safety or in individual liberties, that none of us should be asked to pay.

The issue merits review.

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[10] As this Court has said in a related context, "[t]his Court respects, as it must, the interest of the community in maintaining peace and order on its streets." *Feiner v. People of State of New York*, 340 U.S. 315, 320 (1951) (state has power to prevent clear and present danger of riot or other immediate threat to public safety).

CONCLUSION

For the reasons set out above, the petition should be granted.

Respectfully submitted.

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February 1988

87-1368
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In The
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OCTOBER TERM, 1987

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APPENDIX TABLE OF CONTENTS

Opinion of the District Court (639 F. Supp. 518 (1986))

BILL WILKINSON and James Farrands

v.

Lester FORST, Commissioner of Public Safety for the State of Connecticut at certain times relevant hereto, individually and in his official capacity; Donald Long, Commissioner of Public Safety for the State of Connecticut at certain times relevant hereto, individually and in his official capacity and Austin McGuigan, Chief State's Attorney for the State of Connecticut at all times relevant hereto, in his official capacity; and the City of Meriden.

Civ. No. H-80-755(JAC).

United States District Court
D. Connecticut

June 30, 1986.

Ku Klux Klan members sued law enforcement officials alleging Fourth Amendment and due process violations for indiscriminate, suspicionless weapon searches at political rallies, seeking injunction and nominal damages. The District Court, José A. Cabranes, J., held that: (1) searches were Fourth Amendment violations; (2) Klan members' due process rights had not been violated; and (3) law enforcement authorities were jointly liable to Klan members for nominal damages.

Ordered accordingly.

See also, D.C., 591 F.Supp. 403.

Matthew Horowitz, Springfield, Mass., Shelley White, Hartford, Conn., for plaintiffs.

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Scott J. Murphy, Carl Schuman, Office of Chief State's Atty., Wallingford, Conn., for defendants McGuigan and City of Meriden.

MEMORANDUM OF DECISION

JOSÉ A. CABRANES, District Judge:

I. Introduction

The venerable Justice Oliver Wendell Holmes observed more than a half-century ago that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."[1] It has since been recognized in many difficult circumstances that "[f]reedom of thought carries with it the freedom to speak freely and to publicly assemble to express one's thoughts."[2]

These fundamental principles of American constitutional law must guide the court in resolving the important issue raised in this litigation — namely, whether the stopping and searching of all persons attending political rallies sponsored by the Invisible Empire Knights of the Ku Klux Klan ("the

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[1] *United States v. Schwimmer*, 279 U.S. 644, 654-655 (1929) (Holmes, J., dissenting).

[2] *Collin v. Smith*, 447 F.Supp. 676, 702 (N.D.Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). *See also Hague v. C.I.O.*, 307 U.S. 496 (1939).

Klan") in the State of Connecticut infringe rights guaranteed by the First, Fourth and Fourteenth Amendments to the United States Constitution.

It is useful at the outset to take note of those matters that are *not* at issue in this litigation. Most importantly, this lawsuit does not concern the merits of the political philosophy espoused by the Klan or by those organizations that have vehemently protested the Klan's presence in the State of Connecticut and sought to interfere with the public expression of the Klan's views. Indeed, the court could not decide this case on the basis of its approval or disapproval of the political views held by one or more of the parties, for, as the Supreme Court has instructed, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[3]

Another matter not at issue in this case is whether law-enforcement officials may take all reasonable measures to maintain order at political rallies. This lawsuit does not challenge the ability of law-enforcement officials to designate the sites where Klan rallies may occur or to separate Klan and anti-Klan factions at those rallies.

The lawsuit likewise does not challenge the ability of the state to ban weapons and other dangerous instruments from rally sites and to enforce such a ban through the use of traditional law-enforcement techniques, including searches of persons and automobiles predicated on individualized suspicion of dangerousness or wrongdoing.

Finally, the lawsuit does not challenge the ability of law-enforcement officials to halt a rally if violence erupts or appears imminent and to arrest persons who refuse to disperse as ordered.

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[3] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974).

Instead, the sole issue in this lawsuit is whether the police violate constitutional rights when they stop and search all persons attending rallies of an unpopular political group — and sometimes their automobiles as well — without having any reason to suspect that those particular persons are carrying weapons or other dangerous instruments.

For the reasons stated below, the court holds that the indiscriminate searching of persons and automobiles at Klan rallies violates the plaintiffs' right under the Fourth Amendment to be free from "unreasonable searches and seizures." The court reaches this conclusion after engaging in the "balancing of the need for the particular search against the invasion of personal rights that the search entails"[4] that has been required by the United States Supreme Court. Accordingly, the plaintiffs' prayer for declaratory and injunctive relief and nominal damages is granted; the defendants shall be enjoined from conducting similar mass searches at future Klan rallies and shall pay $1 in nominal damages to each of the plaintiffs.

II. Findings of Fact

The plaintiffs in this action are current or former Klan officers who contend that the searching of all persons who attend Klan rallies in the State of Connecticut infringes their rights under the First, Fourth and Fourteenth Amendments to the United States Constitution. The defendants are the current and former Commissioners of Public Safety for the State of Connecticut, the former Chief State's Attorney and the City of Meriden, Connecticut.[5]

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[4] *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

[5] Defendants Forst and Long are sued in both their individual and official capacities; defendant McGuigan is sued only in his official capacity.

The Klan conducted sixteen rallies in the State of Connecticut between September 13, 1980 and April 30, 1984.[6] These were the first Klan rallies to take place in New England in approximately fifty years.[7] Twelve of the rallies occurred in public areas such as streets, sidewalks and parks, while four of the rallies took place on private property.[8] These rallies were designed to communicate the Klan's purposes, goals and ideas to the public and to recruit new members for the Klan; some of the rallies had specific themes such as support for local police departments, opposition to racial integration, and support for the launching of a nuclear submarine.[9]

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[6] The following chart sets forth the city or town in which each rally occurred, the date of each rally, and whether the rally was conducted on public or private property:

Location	Date	Public/Private
Scotland	Sept. 13-14, 1980	Private
Meriden I	March 21, 1981	Public
Meriden II	July 11, 1981	Public
Windham	Oct. 10-11, 1981	Private
Meriden III	March 20, 1982	Public
Danbury	Aug. 7-8, 1982	Private
Norwich	Aug. 11, 1982	Public
Canterbury	Aug. 14, 1982	Private
Meriden IV	April 30, 1983	Public
New Britain I	June 25, 1983	Public
Stratford	Sept. 10, 1983	Public
Groton I	Oct. 15, 1983	Public
Wallingford	April 28, 1984	Public
West Haven	April 28, 1984	Public
New Britain II	April 29, 1984	Public
Groton II	April 29, 1984	Public

Stipulation of Facts ("Stip.") contained in Final Pretrial Order (entered May 28, 1985) 5. The Klan also conducted rallies in East Windsor and New London on October 6, 1984, and in Meriden on October 7, 1984. However, the parties agreed to present no evidence at trial concerning any rally that occurred after April 30, 1984, other than evidence bearing on the issue of the plaintiffs' standing to maintain this action.

[7] Certified Official Transcript of Trial (filed June 18, 1986) ("Tr.") 842.

[8] *See* Note 7, *supra.*

[9] Tr. 587-588, 672-673, Exhibits 35, 91, 109, 117, 124, 133, 164, 173, 181.

The rallies ranged in size from the Meriden event of March 20, 1982 ("Meriden III"), which attracted approximately twenty Klan members and 2,000 spectators, to the New Britain event of April 29, 1984 ("New Britain II"), which attracted approximately twenty Klan members, six to eight spectators and twenty-five members of the news media.[10] Only five of the sixteen rallies drew crowd in excess of 500 persons.[11] No more than thirty-five Klan members attended any of the rallies.[12]

Plaintiff Wilkinson, who was the chief executive officer of the national Invisible Empire Knights of the Ku Klux Klan from 1976 to 1984, has attended thirteen Klan rallies in Connecticut.[13] Plaintiff Farrands, who has been the chief executive officer of the Connecticut chapter of the Klan since 1981, has attended every Klan rally held in Connecticut.[14] The plaintiffs participated in these rallies in order to recruit new members for the Klan, to associate with persons of similar views, and to maximize the influence of the Klan on the political process.[15]

State or local law-enforcement officials in Connecticut have frequently sought court orders prohibiting the possession of weapons by persons attending Klan rallies.[16] The orders were obtained prior to thirteen of the fourteen rallies for which

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[10]Stip. 13p, 13q, 23r; Defendants' Proposed Findings of Facts and Conclusions of Law (filed Oct. 11, 1985) ("Defendant's Findings of Fact") ¶ 10.

[11]Stip. 9o, 9p, 9q, 10f, 11d, 13p, 17o; Defendant's Findings of Fact ¶ 10.

[12]Stip. 9o, 10d, 11d, 12o, 13q, 16f, 17n, 18k, 19k, 20n, 21o, 22s, 23r, 24r; Defendant's Findings of Fact ¶ 10.

[13]Tr. 585-586; Stip. 9m, 10L, 12z, 13y, 14v, 15t, 16q, 17s, 18r, 21m, 22n, 23m, 24o.

[14]Tr. 671; Stip. 9m, 10L, 11k, 12z, 13y, 14v, 15t, 16q, 17t, 18r, 19n, 20r, 21m, 22n, 23m, 24o.

[15]Tr. 587, 672.

[16]Stip. 6, 7, 9a, 12c, 13c, 14c, 15d, 16a, 17c, 18b, 19c, 20d, 21b, 22c, 23b, 24d. The court orders often were not sought until a few days before the rally was to take place. For example, the defendants filed suit in the state Superior Court on October 7, 1981, to seek an order with respect to the Windham rally scheduled for October 10 and 11, 1981. Stip. 12c. They filed suit on August 11, 1982, to seek an order with respect to the Canterbury rally scheduled for August 14, 1982. Stip. 16a.

they were sought.[17] The orders typically enjoined the possession of "firearm[s] or other dangerous weapons on one's person or in an automobile" within a given distance of the rally site.[18] All but the first of these orders authorized the Connecticut State Police and local police departments to stop persons approaching the rally, to question them concerning their possession of weapons, and "where appropriate to perform frisks" of those persons.[19]

The central fact of this lawsuit is not disputed: All or virtually all persons were stopped and searched by state or local police officers[20] before they could enter the sites of the rallies

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[17]Stip. 9c, 12g, 13h, 14g, 15g, 16c, 17e, 18f, 19e, 20g, 21f, 22h, 23f, 24i. A court order was denied by the state Superior Court with respect to the Canterbury rally. However, the state police effectively circumvented the state court's decision by setting up motor vehicle spot checks in the vicinity of the rally site; officers of the state police stopped vehicles heading toward and away from the rally, checked drivers' licenses and car registrations, and inspected the vehicles for mechanical defects. Tr. 1603-1606; Stip. 16k, 16o, 16r. The police also asked plaintiff Farrands to open the trunk of his car, which he agreed to do. Tr. 686-687.

[18]Exhibits 14, 42, 70, 80, 95, 111, 120, 131, 143, 150, 161, 176, 202. Several of the later orders enjoined the possession of "firearm[s] or other dangerous weapons *or instruments*" at the rallies. (emphasis supplied)

[19]*Id.* Only two of the court orders did not utilize the quoted language. The Scotland order made no reference to searches. Exhibit 14. The West Haven order stated that "[t]hose who choose to enter the designated area will be subject to examination by means of metal detector, questioned concerning their possession of weapons, and where appropriate, a frisk for weapons will be performed." Exhibit 150. The Groton II order stated that automobiles as well as persons could be subject to search. Exhibit 202.

[20]Officers of the Connecticut State Police participated in the searches of persons or automobiles, or both, at all but three of the rallies at issue in this lawsuit. Tr. 840, 1153, 1156, 1157, 1160, 1161-1162, 1166-1170, 1509-1510, 1519-1520, 1556, 1573-1574, 1602-1603, 1685-1686, 1690-1691. At one of the remaining rallies, the state police were stationed at entrances to oversee search operations; the state police were also present at the other two rallies to assist the local police in maintaining order. Tr. 1156, 1160, 1161-1162. State police and police of the City of Meriden searched persons attending the Meriden III and Meriden IV rallies. Tr. 1153, 1651.

for which court orders had been obtained.[21] The searches were performed without regard to whether the persons were suspected of carrying weapons. It is likewise not controverted that all cars entering the rallies conducted on private property were stopped and searched.[22] Cars carrying Klan members to some of the rallies on public property were also stopped and searched; however, cars carrying persons other than Klan members were not searched on these occasions.[23] Plaintiff Wilkinson was searched at eleven of the rallies;[24] plaintiff Farrands was searched at fourteen rallies,[25] and his car was searched at ten rallies.[26]

The intensity of the searches performed on persons and automobiles has varied substantially from rally to rally. At most rallies, persons were subjected to a pat-down search, and pocketbooks and similar items were examined for weapons.[27] At some rallies, persons were also required to empty their pockets, roll up their trousers, remove their shoes, and reveal the contents of their wallets.[28] Persons were sometimes searched more than once at a single rally for no apparent reason.[29] Some of those attending the West Haven and Norwich

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[21]Stip. 9h, 9i, 12k, 12L, 13m, 13n, 13o, 14L, 14m, 14n, 15c, 15n, 17j, 17k, 17L, 18n, 18o, 18s, 19i, 20L, 21j, 21k, 22L, 23L, 24m. Anti-Klan factions often did not submit to searches but instead remained immediately outside the rally entrances. It therefore appears that the searches alone could have done little to prevent violence between Klan and anti-Klan forces outside rally perimeters and, indeed, could not have prevented an anti-Klan demonstrator from firing a shot into the rally.

[22]Stip. 9h, 9j, 12m, 14L, 14m, 14n.

[23]Stip. 18s, 19h, 20L, 21n, 22r, 23o, 24n; Tr. 682-683.

[24]Stip. 9n, 12aa, 13z, 14w, 15u, 17u, 18s, 21n, 22p, 22q, 23p, 24p.

[25]Stip. 9n, 11f, 12aa, 13z, 14w, 15u, 17u, 18s, 19h, 20L, 20r, 21n, 22p, 22q, 23p, 24p.

[26]Stip. 9n, 12aa, 14w, 18s, 19h, 20L, 21n, 22r, 23o, 24q.

[27]Stip. 9n, 11f, 12L, 13n, 14m, 14w, 15n, 17k, 17u, 18n, 19i, 20L, 21n, 22L, 22p, 23L, 23p, 24m, 24n, 24u.

[28]Tr. 140-141, 592, 611, 677, 699-701.

[29]Tr. 601, 603, 611, 652, 677, 681-684.

rallies were searched first by hand-held magnetometers and then, if they triggered the magnetometer, were subjected to a pat-down search; those who triggered a magnetometer were frisked without having an opportunity to empty their pockets of metal objects and then to be reexamined by the magnetometer.[30] Police officers at some rallies searched under the hoods of cars and inside passenger compartments, glove compartments, trunks, air filters, hubcaps and closed containers found in the cars.[31]

The police confiscated any items that they considered dangerous and returned those items to their owners sometime after the rally.[32] These items ranged from rocks, knives and baseball bats to cameras, credit cards, change purses and an apple.[33] Most of these items were found in vehicles rather than on the persons of those attending the rallies.[34] Firearms were confiscated at only two of the rallies.[35]

The searches of persons and automobiles caused substantial annoyance and embarrassment to the plaintiffs and others who attended the Klan rallies.[36] The searches have deterred many persons from attending the rallies,[37] as both participants and law-enforcement officials have recognized, and

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[30]Tr. 300-301; Stip. 15n, 21j, 21k.

[31]Tr. 205, 232-233, 601-602, 679-680.

[32]Stip. 12t, 21L, 22L, 23L.

[33]Exhibits 17, 21, 48, 49, 50, 89, 112, 115, 165, 237.

[34]Stip. 12t; Tr. 1608.

[35]In one case, the firearms were owned by the family on whose property the rally took place. Stip. 14x; Tr. 255-257, 606; Exhibits 78, 100. In the other case, the owners of the firearms may have been unaware of the court order entered the previous day that nullified their otherwise valid weapons permits. Tr. 1629.

[36]Tr. 46, 268, 616, 689, 766.

[37]Tr. 268-269, 564, 763-764, 1670; Exhibits 55, 73, 109, 128, 149, 157, 164, 174, 214, 237, 239.

would likely deter many more from attending similar rallies in the future.

The initial Klan rally in Connecticut occurred approximately one year after the killing of several persons during a confrontation between Klan and anti-Klan forces in Greensboro, North Carolina. It was uncontroverted at trial that the circumstances of the Greensboro incident were significantly different from the circumstances of any of the Klan rallies held in Connecticut. For example, the Greensboro violence occurred in the absence of any law-enforcement officers,[38] and the pro- and anti-Klan groups at Greensboro were not the same groups that participated in the Connecticut rallies.[39]

Physical confrontations occurred at the first three Klan rallies held in Connecticut. These were the Scotland rally of September 13-14, 1980; the Meriden rally of March 21, 1981 ("Meriden I") and the Meriden rally of July 11, 1981 ("Meriden II").[40] The injuries sustained at these rallies were caused by objects such as fists, rocks and bottles rather than by firearms, knives, clubs or other such weapons.[41] These injuries occurred despite the searching of all persons and cars attending the Scotland rally and the searching of all Klan members who attended the Meriden II rally.[42]

Klan members did not initiate or participate in any of these confrontations[43] and generally have cooperated with law-enforcement officials in planning and conducting their rallies.[44] Indeed, according to the Connecticut State Police, the

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[38]Tr. 133, 369-370, 1120.

[39]Tr. 807-808, 1121.

[40]Tr. 175-176, 819, 1052-1053, 1062-1063; Exhibit 46; Stip. 9K, 10h, 11h.

[41]Tr. 176, 819, 1052-1053, 1062-1063.

[42]Tr. 149-156, 564-576; Stip. 9i, 9j, 11f.

[43]Tr. 149-150; 1052; Exhibits 101, 130.

[44]Exhibits 39, 55, 94, 106, 112, 121, 130, 146, 214, 217, 160 at 38-39.

security threat at Klan rallies is posed not by the Klan but rather by certain anti-Klan groups.[45]

The plaintiffs' expert witness, Robert Klotz, the retired Deputy Chief of the Washington, D.C., Police Department and Commander of the Special Operations Division that handled all parades, rallies and demonstrations in that city of parades, rallies and demonstrations,[46] testified credibly that violence occurred at the early Klan rallies because state and local police officers failed to use appropriate crowd-control techniques.

For example, an insufficient number of police officers were assigned to these rallies, and many of the officers who were present were deployed in the wrong locations. Only 50 police officers were present at the Meriden I rally to control a crowd of 21 Klan members and 1,500 to 2,000 spectators, including anti-Klan demonstrators;[47] in contrast, at the Meriden III rally, where no violence occurred, 247 police officers were assigned to control a crowd of approximately 20 Klan members and 2,000 spectators,[48] and at the similarly non-violent Meriden IV rally on April 30, 1983, 317 police officers were assigned to control a crowd of approximately 25 Klan members and 1,000 spectators.[49] Furthermore, the police failed to clear the sites of the early rallies of rocks, bottles and other

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[45]Tr. 134-139, 1050-1052, 1677, 1683; Exhibits 39, 55, 72, 101, 130, 214, 246.

[46]It is true that Chief Klotz gained most of his quarter-century of crowd-control experience in Washington, D.C., and not in Connecticut. However, his experience, which far exceeds the experience of any of the defendants' witnesses both quantitatively and qualitatively, is highly relevant to the issues presented in this case. *See* Tr. 91-105. For example, Chief Klotz was responsible for the police response to a number of potentially explosive demonstrations in the nation's capital involving, for example, Iranian students at the time of the hostage crisis and members of the Palestine Liberation Organization at the time of the signing of the Israeli-Egyptian peace treaty.

[47]Tr. 370; Stip. 10d, 10e, 10f, 10g.

[48]Stip. 13p, 13q, 13s, 13aa.

[49]Stip. 13p, 13q, 13r, 13s, 13t, 13aa.

potential projectiles before the participants arrived, and then properly to separate the Klan supporters from the anti-Klan demonstrators.[50]

These deficiencies in crowd control were acknowledged at trial by members of the Connecticut State Police, who explained that they had had no previous experience or training in maintaining order at such demonstrations.[51]

Police performance improved markedly at the thirteen rallies that followed Meriden II.[52] Few injuries were sustained at these later rallies, and order was maintained despite the frequent presence of anti-Klan demonstrators.[53] The court credits the expert opinion of Chief Klotz that the ability of the police to maintain order at the later rallies was attributable not to their indiscriminate searches of persons and automobiles at those rallies, but rather to a stronger and more visible police presence, to a greater mastery of traditional crowd-control techniques by both state and local law-enforcement officials, and to the use of such practices as requiring rallies to be held at sites (such as athletic fields in public parks) where security could more easily be assured, separating Klan forces from anti-Klan forces by restricting each group to designated areas at the rally sites, and removing from the rally sites debris such as rocks and bottles that could be used to inflict injuries.[54] The court likewise credits the expert opinion of Chief Klotz that the indiscriminate searches of persons and automobiles were not necessary or even particularly helpful in preventing violence at Klan rallies, and that order could have been

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[50]Tr. 149-157, 165-174, 187-192 370.

[51]Tr. 863-864, 1064-1065, 1082-1083, 1111-1113, 1132-1133, 1529, 1607, 1662-1664, 1695.

[52]Tr. 128-132, 170-171, 185-192, 220-225, 227-228, 264-265, 282-283, 295-296, 308, 1064-1067, 1132-1134.

[53]Stip. 12r, 12s, 13s, 13t, 14p, 14q, 15p, 16h, 17q, 18q, 19L, 20q, 21q, 22t, 24t; Exhibit 160.

[54]Tr. 128-132, 220-228, 241-259, 264-266, 270-272, 280-281, 286-287, 291-293, 295-296, 302-303, 304-305.

maintained at the rallies through the use of the other crowd-control techniques that already had been adopted by Connecticut law-enforcement officials.[55]

It appears that the Klan intends to conduct additional rallies in Connecticut and that the plaintiffs plan to participate in those rallies.[56] In the event that any such rally is announced, the defendants can be expected to seek court orders similar to those obtained prior to previous rallies and to search all persons attending the rally.

III. Conclusions of Law[57]

A. The Fourth Amendment Challenge

[1] The court turns first to the plaintiffs' contention that the mass searches of persons and automobiles at Klan rallies in the State of Connecticut violated their rights under the Fourth Amendment to the United States Constitution.

The Fourth Amendment prohibits "unreasonable searches and seizures" of persons and their property "in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-654, 99 S.Ct. 1391, 1395-1396, 59 L.Ed.2d 660 (1979). The Supreme Court has recognized that the test of the "reasonableness" of a search under the Fourth Amendment "requires

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[55]Tr. 132, 210, 227-228, 241-242, 275-276, 279-280, 281, 287-288, 293, 296, 302-304, 308, 369-370.

[56]Tr. 587.

[57]Defendant McGuigan previously moved to dismiss on the grounds that plaintiff Wilkinson (then the sole plaintiff) lacked standing to maintain the action, that the action was moot, and that the action was not ripe for decision; McGuigan simultaneously moved for summary judgment, contending that there were no disputed issues of material fact and that he was entitled to judgment as a matter of law. The court denied these motions in a ruling entered July 11, 1984, and reported at 591 F.Supp. 403 (D.Conn.1984).

a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bill v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). Among the factors that the court must consider in undertaking this inquiry are "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* The court will proceed to consider each of these factors.

1. *The need or justification for the searches*

The purpose of the searches at issue in this lawsuit was to prevent outbreaks of violence at Klan rallies. It cannot be denied that the maintenance of order at public gatherings is a legitimate and important purpose.

One factor to be considered by the court in assessing the need for a particular search, however, is whether the purpose of the search could have been achieved by less intrusive means.[58] *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 566 n. 6 (1st Cir.1985) (holding that suspicionless searches of all jail visitors could not be sustained absent a close relationship between the searches and their asserted purpose); *see also United States v. Oyekan*, 786 F.2d 832, 838 (8th Cir.1986)

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[58]Our Court of Appeals has previously suggested that a search may be held unreasonable under the Fourth Amendment simply because the government failed to employ the least restrictive means available. *See, e.g., United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974) ("it is, and indeed for the preservation of a free society must be, *a constitutional requirement that to be reasonable the search must be as limited as possible commensurate with the performance of its functions*" [emphasis in original]). This holding appears to be inconsistent with the Supreme Court's decisions in cases such as *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983) (holding that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means"). However, consideration of the alternative means that might have been employed by the defendants as *one factor* in the "reasonableness" analysis is fully consistent with the decisions of the Supreme Court and our Court of Appeals.

(indications that searches of alleged drug smugglers were performed "by the least intrusive means possible" were "important considerations in weighing 'the level of insult to personal privacy visited upon the victim of a search' ").

This court has found, based on the expert testimony of Chief Klotz and the other evidence presented at trial, that mass searches of persons and automobiles are not necessary or even particularly helpful in preventing violence at Klan rallies in Connecticut. *See* Findings of Fact, *supra*, at notes 53–56 and accompanying text. Instead, the court has found that state and local law-enforcement officials have, since at least the time of the fifth Klan rally on March 20, 1982, employed other, less intrusive measures that will be sufficient in themselves to preserve order at Klan rallies without resort to indiscriminate searches of persons and automobiles. *Id.* These measures include the deployment of an adequate number of law-enforcement officers, the mastery of traditional crowd-control techniques, which necessarily include the ability to conduct a frisk for weapons whenever there are "specific and articulable" facts to support a reasonable belief that a particular individual poses a threat to the public safety, *see Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1967) *("Terry")*, and the use of reasonable time, place and manner restrictions that may require, for example, that rallies be held at sites where security can more easily be assured and that Klan forces be separated from anti-Klan forces at the rallies. *See Findings of Fact, supra*, at note 5 and accompanying text.

In sum, the court finds that the mass searches of persons and automobiles undertaken by the defendants do not bear a close relationship to the important purpose of maintaining order at Klan rallies. Accordingly, the court holds that the need for the searches at issue in this lawsuit is not particularly substantial.

2. The scope of the intrusion and the manner in which it was conducted

The Supreme Court has repeatedly held that "even a limited search of the person is a substantial invasion of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (1985), *citing Terry, supra*, 392 U.S. at 24-25, 88 S.Ct. at 1881, 20 L.Ed.2d 889 (1967). Indeed, as the Court recognized in *Terry*,

> it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17, 88 S.Ct. at 1877.

The Supreme Court has similarly held that "searches of closed items of personal luggage [such as pocketbooks and briefcases] are intrusions on protected privacy interests," *New Jersey v. T.L.O., supra*, 105 S.Ct. at 741, *citing United States v. Ross*, 456 U.S. 798, 822-823, 102 S.Ct. 2157, 2171-2172, 72 L.Ed.2d 572 (1982), and that even the search of an automobile is "a substantial invasion of privacy." *United States v. Ortiz*, 422 U.S. 891, 896, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975). *See also Delaware v. Prouse, supra*, 440 U.S. at 662-663, 99 S.Ct. at 1401 ("Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.").

The defendants have pointed to no decisions of the lower federal courts, except for decisions concerning prisons and similarly secure facilities,[59] that have upheld suspicionless searches of individuals and automobiles that were as intrusive as the searches conducted in the instant case. For example, our Court of Appeals in *United States v. Albarado*, 495 F.2d 799 (2d Cir.1974) *("Albarado")* recognized the necessity of subjecting every airline passenger to a weapons search. However, the court in that case did not authorize initial frisks of all airline passengers; instead, because "passing through a magnetometer has none of the indignities involved in . . . a frisk," *id.* at 806, frisks were permitted only after an individual had first triggered a free-standing magnetometer, then been given an opportunity to remove any metal objects from his person, and then triggered the magnetometer a second time. *Id.* at 807–809. *See also McMorris v. Alioto*, 567 F.2d 897, 901 (9th Cir.1978) (permitting frisks of persons entering courthouse where evidence established that "[t]hey are apparently given more than one opportunity to pass through the magnetometer" before being subjected to a pat-down search).

In contrast, no free-standing magnetometers were used to search persons attending Klan rallies in Connecticut. Instead, most persons attending the rallies were required at a minimum to submit to initial pat-down frisks by law-enforcement officers. Even at the two rallies where some searches were conducted with hand-held magnetometers, which are arguably more intrusive than free-standing magnetometers, an individual who triggered the magnetometer was immediately frisked without having an opportunity to remove any metal objects from his pockets or elsewhere on his person and then to be searched again with the magnetometer. *See* Findings of Fact, *supra*, at note 31 and accompanying text.

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[59] *See* Section 3, *infra*, for a discussion of the significance of the location of the search in the Fourth Amendment analysis.

Accordingly, the court finds that the privacy interests implicated by these indiscriminate searches of persons and automobiles at Klan rallies are substantial.[60] Furthermore, the intrusions on personal privacy were exacerbated by the manner in which some of the searches were conducted. For example, the record reveals that the plaintiffs and other Klan members were sometimes subjected to several searches of their persons and automobiles at a single rally for no apparent purpose, *see id.* at note 30 and accompanying text, and that some of the searches were significantly more intrusive than the frisks described in *Terry*. *See id.* at note 29 and accompanying text. It is not clear that any of the defendants approved or ratified these particular searches. However, these incidents illustrate the disregard of privacy interests that can result from an official policy that permits indiscriminate searches.

3. *The places where the searches occurred*

The Supreme Court explicitly recognized in *Bell v. Wolfish*, *supra*, 441 U.S. at 559, 99 S.Ct. at 1884, that the reasonableness of a search is dependent in part on "the place in which

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[60]It is true that our Court of Appeals has held that a frisk, while "normally . . . considered a gross invasion of one's privacy," may become somewhat "less noxious" where, as here, all those present may be subject to search, the person has some advance notice that he may be searched if he chooses to engage in a particular activity, and he may avoid search by forgoing that activity. *Albarado*, *supra*, 495 F.2d at 807–808. However, as the court implicitly recognized in *Albarado*, the invasion of privacy remains substantial even under these mitigating circumstances. *Id.* at 807–810. Moreover, universal frisks are not necessarily less intrusive than selective ones where the persons frisked are not airline passengers, as in *Albarado*, but instead are persons seeking to attend rallies of an unpopular political organization. As the court recognized in *Albarado*, *supra*, 495 F.2d at 807, the "stigma" attaching to a frisk "is lessened by being one of a crowd" of airline passengers; however, the stigma felt by some spectators at Klan rallies may not be substantially reduced as a result of receiving the same treatment as white-robed Klansmen. *Cf. N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958) (observing that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs").

it is conducted." In that case, the Court permitted suspicionless searches of prison inmates after contact visits expressly because "[a] detention facility is a unique place fraught with serious security dangers" where persons could have few reasonable expectations of privacy. *Id.* The Court has not authorized suspicionless searches of individuals or automobiles in any other context. *See, e.g., United States v. Ortiz, supra* (vehicle searches at checkpoints near boarder may be conducted without consent only if there is probable cause to believe that the vehicle contains illegal aliens).

The public parks, streets and sidewalks where most of the Klan rallies occurred are a far cry from prison cell blocks, the only location where the Supreme Court has permitted persons to be searched without suspicion. *See Bell v. Wolfish, supra.* The Court has repeatedly characterized parks, streets and sidewalks as traditional public forums that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939). It is for this reason that "the government's ability to permissibly restrict expressive conduct [in such public forums] is very limited." *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983).

There is also a clear distinction between traditional public forums and those few locations in which the lower federal courts have permitted suspicionless searches of persons and their vehicles. For example, courts have upheld searches conducted in or near prisons and military installations, *see, e.g., United States v. Miles*, 480 F.2d 1217 (9th Cir.), *cert. denied*, 414 U.S. 1008, 94 S.Ct. 369, 38 L.Ed.2d 245 (1973) (search of vehicle seeking to enter restricted area of military base); *McDonell v. Hunter*, 612 F.Supp. 1122 (S.D.Iowa 1985) (frisks of prison employees), where "security considerations reduce the scope of reasonable expectations of privacy that one normally holds and make[] reasonable some intrusions that would

not be reasonable outside of the facility." *Id.* at 1128. *But see Blackburn v. Snow, supra*, 771 F.2d at 564 (rejecting the argument that the security needs of the jail justified a policy of suspicionless strip searches of all jail visitors).

The instant case is likewise distinguishable from those cases that have permitted suspicionless weapons searches of persons at airports and courthouses, *see, e.g., Albarado, supra* (airline passengers); *McMorris v. Alioto, supra* (courthouse visitors), because airplanes and courthouses, like prisons and military bases, present special security concerns that are not present in traditional public forums. The threat posed by a weapon on an airplane or in a courthouse is significantly different from the threat posed by a weapon at a public rally. That is because rallies can be monitored by law-enforcement officers who can be expected to deter violence by their mere presence and to take prompt and appropriate action to control any violence that does occur; in contrast, there usually are no law-enforcement officials present on an airplane or in most areas of a courthouse who could deter or control any incidents of violence. *See generally Gaioni v. Folmar*, 460 F.Supp. 10, 13 (M.D.Ala.1978) (Johnson, J.) (rejecting analogy between suspicionless airport searches and suspicionless searches of persons attending rock concert on the ground that "airport searches . . . are justifiable only because of certain 'unique circumstances,' such as the enormous potential for violence in an airplane bombing or hijacking and the necessity of discovering the plot before overt action is taken"). Furthermore, because a courthouse where criminal cases are tried presents some of the same security concerns as does a prison, a person's reasonable expectations of privacy are less substantial in a courthouse than in a traditional public forum.

Of course, the instant case is also distinguishable from those cases that have permitted suspicionless stops of persons and vehicles entering the United States at checkpoints located near the border. *See, e.g., United States v. Martinez-*

Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (*Martinez-Fuerte*").[61] The courts have long recognized that

> [b]order searches are, and have always been, sui generis. Neither warrant nor probable cause is essential for such a search, which is presumed reasonable merely by virtue of the person's or thing's entry into our country from the outside.

United States v. Saunders, 663 F.2d 1, 2-3 (2d Cir.1981), *citing United States v. Ramsey*, 431 U.S. 606, 619, 97 S.Ct. 1972, 1980, 52 L.Ed.2d 617 (1977).

Accordingly, the court holds that the fact that most of the searches occurred at traditional public forums that were being used for expressive activity — rather than in prison, airports or other locations with special security needs that could not be met through standard law-enforcement techniques — weighs against the constitutional validity of the searches.

4. *The Fourth Amendment balancing test*

The court must now proceed to "balanc[e] . . . the need for the particular search against the invasion of personal rights that the search entails" as required by *Bell v. Wolfish*, *supra*, 441 U.S. at 559, 99 S.Ct. at 1884. First, the court has found that the need for the indiscriminate searches of persons and vehicles is relatively insubstantial, because the important purpose of preserving order at Klan rallies is already being adequately served by other, less intrusive measures; these include the deployment of a sufficient number of

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[61] Furthermore, the activity authorized in *Martinez-Fuerte* consisted only of stopping vehicles at a checkpoint some distance from the border and questioning their occupants; the Court's decision was expressly limited to stops where "[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search." 428 U.S. at 558, 96 S.Ct. at 3083. *Cf. United States v. Ortiz*, *supra* (vehicle searches at checkpoints near border may be conducted without consent only if there is probable cause to believe that the vehicle contains illegal aliens).

law-enforcement officers, the use of standard crowd-control techniques, and the adoption of reasonable time, place and manner restrictions with respect to the rallies. *See* Section 1, *supra.* Second, the court has found that the personal privacy interests implicated by the searches of individuals and their vehicles are significant. *See* Section 2, *supra.* Finally, the court has found that the fact that the searches were conducted in traditional public forums weighs against their constitutional validity. *See* Section 3, *supra.*

The court must conclude upon weighing these factors that the searches at issue in the instant case are unreasonable under the Fourth Amendment. This conclusion is reinforced by the defendants' failure to call to the court's attention any decisions of the Supreme Court or our Court of Appeals that have permitted public officials to conduct suspicionless searches so intrusive on personal privacy outside prisons and other facilities with special security needs that cannot be met through the use of standard law-enforcement practices.

The defendants have attempted to avoid this result by referring to decisions that have authorized so-called "administrative" searches conducted without individualized suspicion for some purpose other than enforcing the criminal laws. *See, e.g., Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (searches of workplaces by Occupational Health and Safety Administration); *Martinez-Fuerte, supra* (stops of vehicles passing permanent customs checkpoints); *Camera v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (searches of residences conducted for purpose of enforcing municipal housing code). However, as explained in greater detail above, the courts have authorized no suspicionless "administrative" search that was as intrusive as the searches conducted in the instant case and that was conducted outside a prison, military base, airport, border checkpoint or similar location with unique security needs.

Furthermore, the Supreme Court and our Court of Appeals, in determining whether searches of individuals and

their possessions are reasonable under the Fourth Amendment, have been reluctant to distinguish so-called "administrative" searches from searches conducted in the investigation or prosecution of a crime. For example, the Supreme Court only recently observed that

> [b]ecause the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," . . . it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

New Jersey v. T.L.O., supra, 105 S.Ct. at 740 (citations omitted). *See also Delaware v. Prouse, supra,* 440 U.S. at 662, 99 S.Ct. at 1400 (1979) ("if the government intrudes . . . the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards"); *Martinez-Fuerte, supra,* 428 U.S. at 560 n. 14, 96 S.Ct. at 3084 n. 14 ("[t]he fact that the purpose of such laws [allowing state and local officials to stop automobiles to check drivers' license, safety requirements and similar matters] is said to be adminstrative is of limited relevance in weighing their intrusiveness on one's right to travel"); *Albarado, supra,* 495 F.2d at 804 n. 9 (observing that there is "no analytical significance" to the label "administrative" when applied to an airport search). Indeed, the Court of Appeals has observed that "there seems no rational limit to what searches can be ultimately justified on the basis of [the administrative search cases] once the reasoning of those cases is expanded beyond facts which involved detection of local building code violations." *United States v. Barbera,* 514 F.2d 294, 299 n. 12 (2d Cir.1975).

Instead, the foregoing decisions suggest that the courts intend to limit suspicionless "administrative" searches to circumstances similar to those of *Camara v. Municipal Court,*

supra, 387 U.S. at 537, 87 S.Ct. at 1735, where the search is of a type that has "a long history of judicial and public acceptance," where "it is doubtful that any other canvassing technique would achieve acceptable results," and where "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime."

Accordingly, the court must reject the defendants' contention that the suspicionless frisks of the plaintiffs and searches of their automobiles should be upheld as permissible "administrative" searches.

Similarly unavailing is the defendant's argument that the searches at issue in this case are somehow made reasonable by the fact that court orders were obtained prior to thirteen of the fourteen rallies at which searches were conducted. Even if one assumes for the argument that the existence of a court order authorizing suspicionless searches would have some bearing on the reasonableness of such searches, the court orders in this case provided no authority for any such searches. Instead, the court orders merely authorized law-enforcement officials "*where appropriate* to perform frisks." *See* Findings of Fact, *supra*, at note 20 and accompanying text (emphasis added). Only one of the court orders provided any authority for automobile searches. *Id.* Furthermore, the legitimacy of suspicionless searches was never ruled upon by any of the state courts that issued the orders.

In sum, the court concludes, for the reasons stated above, that the defendants' practice of searching persons and vehicles attending Klan rallies without individualized suspicion of dangerousness or wrongdoing violates the plaintiffs' rights under the Fourth Amendment.[62] Accordingly, the defendants shall be permanently enjoined from conducting such searches in the absence of "specific and articulable" facts to support

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[62]It is therefore unnecessary for the court to consider the plaintiffs' alternative argument that the challenged searches violate their rights under the First Amendment.

a reasonable belief that a particular individual poses a threat to the public safety, *Terry, supra*, 392 U.S. at 21, 88 S.Ct. at 1879, or probable cause to believe that the individual is violating the law.

B. The Due Process Challenge

[2] The plaintiffs also contend that they were deprived of their rights to due process of law under the Fourteenth Amendment by certain actions taken by the defendants in obtaining court orders prior to thirteen of the Klan rallies. More specifically, the plaintiffs contend that the defendants denied them "meaningful appellate review" of the court orders by seeking the orders only shortly before the rally dates and by failing to assure that each order was accompanied by an explanation of the state court's reasoning process.

The plaintiffs can prevail on a due process claim only if they were deprived under the challenged procedure of a protected "liberty" or "property" interest. *See generally Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). However, as noted above, the court orders do not deprive the plaintiffs of any rights secured to them under federal or state law. Instead, the court orders merely state that the law-enforcement officials may perform searches "where appropriate" — or, in other words, where such searches would be consistent with the relevant Fourth Amendment precedents of the Supreme Court. It would be inappropriate for this court to presume from the record of this case that the state courts intended by the quoted language to authorize any actions contrary to the United States Constitution.

Accordingly, the court must reject the plaintiffs' claims under the Due Process Clause.

C. The "Qualified Immunity" Defense

[3] The plaintiffs seek nominal damages for the violation of their constitutional rights against the defendants Forst,

Long and the City of Meriden. The defendants must be held immune from liability for damages if the court finds that their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). However, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* at 818, 102 S.Ct. at 2738.

It is irrelevant to the immunity inquiry after *Harlow v. Fitzgerald* whether a defendant acted with a subjective good-faith belief that his conduct was constitutional. The court has no reason to believe that the defendants in this case were motivated by any evil purpose; instead, they apparently conducted the searches at issue in good faith and for the sole purpose of maintaining order under difficult circumstances.

However, the conditions under which police officers may conduct frisks of individuals and searches of automobiles have been clearly established by the Supreme Court in a series of decisions that antedate the events at issue here. *See* Part A, *supra.* As noted above, the defendants have been unable to point to any decisions of the Supreme Court or of the lower federal courts that have authorized indiscriminate searches so intrusive of personal privacy interests to be conducted in settings other than prisons, military bases, airports and other areas with special security concerns that cannot be adequately addressed through standard law-enforcement techniques.

The defendants, as reasonably competent law-enforcement authorities, should have known of the law applicable to searches conducted without individualized suspicion. Accordingly, the defendants are jointly liable to each of the plaintiffs for $1 in nominal damages. *Cf. Dale v. Bartels*, 732 F.2d 278, 285 n. 12 (2d Cir.1984) (Friendly, J.) (holding that claim was not precluded on qualified immunity grounds where "[t]he unlawful seizures alleged by [the plaintiff] constitute clear violations of well-known fourth amendment rights of

which a law enforcement officer such as [the defendant] had every reason to be aware").

IV. Conclusion

The court has "approach[ed] the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other," *Terry, supra,* 392 U.S. at 12, 88 S.Ct. at 1875, but conscious of its time-honored "responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Id.* at 5, 88 S.Ct. at 1871. "When such conduct is identified," the Supreme Court has instructed, "it must be condemned by the judiciary." *Id.*

The record of this case indicates that Connecticut law-enforcement officers have the knowledge and the experience to maintain order at Klan rallies through the use of crowd-control techniques that are less intrusive than the mass searches challenged in this lawsuit. It was the police's eventual mastery of these techniques, and not their indiscriminate searches of persons and automobiles, that prevented violence at each of the thirteen Klan rallies conducted since Meriden II on July 11, 1981. Indeed, today's decision may be viewed as an expression of confidence in the ability of Connecticut law-enforcement officers to preserve the peace under concededly difficult circumstances without resorting to a practice that "trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Id.*

Of course, this decision does not necessarily prevent the police from adopting new techniques that are intended to maintain order at potentially explosive political events without infringing the constitutional rights of participants and spectators; moreover, the defendants are not barred from seeking relief from the prospective effect of this decision if future Klan rallies depart so substantially from past rallies as

to suggest that order can no longer be maintained without the use of more intrusive measures. *See* Rule 60(b)(5), Fed.R. Civ.P. (court may modify judgment if "it is no longer equitable that the judgment should have prospective application"). The court intimates no view with respect to the application of today's decision to other law-enforcement tactics or to political events that are less amenable to control through accepted law-enforcement techniques than the Klan rallies at issue in the instant case.

Finally, the court cannot promise that not even a black eye or a bloody nose will ever occur at any future Klan rally held in Connecticut. Our system of ordered liberty cannot guarantee that the clash of views will never erupt into the clash of fists. It cannot guarantee that a person will never suffer physical or emotional harm as a result of another person's exercise of his constitutionally protected freedoms.

However, the choice of whether to impose restrictions *before* any unrest has occurred, or to take action only *after* the unrest has erupted, cannot always be left to the discretion of law-enforcement officials, regardless of their competence and their good faith. In some cases, as where the preventive measures would infringe an individual's rights of privacy or expression, we must occasionally accept the risk of violence in order to preserve the fundamental liberties enshrined in our Constitution. As the Supreme Court has recognized,

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . .; and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969).

In sum, the court has found that the plaintiffs' rights under the Fourth Amendment have been infringed by the practice of indiscriminately searching persons and automobiles at Klan rallies in Connecticut. The defendants are hereby enjoined from conducting such searches at future Klan events in the absence of either (1) "specific and articulable" facts to support a reasonable belief that a particular individual poses a threat to public safety, *Terry, supra*, 392 U.S. at 21, 88 S.Ct. at 1879, or (2) probable cause to believe that the individual is violating the law (including a valid ban on the possession or display of weapons at rallies). In addition, the defendants Long, Forst and the City of Meriden are jointly liable to each of the plaintiffs for $1 in nominal damages on account of the infringement of their constitutional rights.

It is so ordered.

Memorandum of the District Court on Petitioners' Motions for Stay and for Relief From Judgment (656 F.Supp. 710 (1986))

Bill WILKINSON and James Farrands

v.

Lester FORST, Donald Long, Austin McGuigan and the City of Meriden.

Civ. No. H-80-755(JAC).

United States District Court,
D. Connecticut,

Aug. 22, 1986.

Law enforcement officials who had been previously enjoined from conducting mass search of persons attending Ku Klux Klan rally moved for stay of proceedings pending appeal and for relief from judgment. The District Court, José A. Cabranes, J., held that: (1) in abstract sense, magnetometer search of all persons attending particular political rally might withstand constitutional scrutiny if threat of violence at particular rally was so clear and substantial that use of more conventional law enforcement mechanisms would be unlikely to succeed in maintaining order and ensuring public safety; (2) law enforcement officers produced no persuasive evidence that there was any greater risk of violence at upcoming Ku Klux Klan rally than at previous rallies held in area, to justify invasiveness of mass search; and (3) although police officers could not conduct mass search, they were still entitled to search persons where officers had probable cause to believe persons were violating law, or to exercise other law enforcement techniques, such as appropriate crowd control measures.

Motion denied.

See also, 591 F.Supp. 403 (D.Conn.1984) and 639 F.Supp. 518 (D.Conn.1986).

1. Searches and Seizures

In abstract sense, magnetometer searches of all persons attending particular political rally might withstand constitutional scrutiny if threat of violence at particular rally was so clear and substantial that use of more conventional law enforcement mechanisms would be unlikely to succeed in maintaining order and ensuring public safety, or if large group of people might be jeopardized in some extraordinary way.

2. Searches and Seizures

Mass searches of persons attending Ku Klux Klan rally, through use of magnetometer, would violate Fourth Amendment, where evidence revealed that there had been no violent incidents of any Klan rally held in area involving use of weapons such as those which might be detected through use of magnetometers, and where past violent incidents, which involved fists, rocks and bottles, were substantially attributable to failure of law enforcement officials to use appropriate crowd control techniques. U.S.C.A. Const.Amend. 4.

3. Criminal Law

Searches and Seizures

Although law enforcement officers were precluded from conducting mass search of persons attending Ku Klux Klan rallies through use of hand-held magnetometer, in absence of probable cause to believe that persons were carrying weapons or otherwise violating law, police could continue to use other crowd control techniques, including enforcement of state court order banning weapons within 3,000 feet of rally site, separation of Klan forces from anti-Klan forces by restricting each group to designated areas of rally site, and searching persons who police had probable cause to believe were carrying weapons. U.S.C.A. Const.Amend. 4.

Matthew Horowitz, Springfield, Mass., Shelley White, Hartford, Conn., for plaintiffs.

Stephen J. O'Neill, Richard T. Biggar, Office of Atty. Gen., James J. Szerejko, Hartford, Conn., for defendants Forst and Long.

Scott J. Murphy, Carl Schuman, Office of Chief State's Atty., Wallingford, Conn., for defendants McGuigan and City of Meriden.

MEMORANDUM SUPPLEMENTING ORAL RULINGS ON MOTION FOR STAY AND MOTION FOR RELIEF FROM JUDGMENT

JOSÉ A. CABRANES, District Judge:

On August 19, 1986, following an evidentiary hearing at which both sides presented the testimony of witnesses, the court denied the defendants' Motion for Stay of Proceedings Pending Appeal (filed July 30, 1986) and Motion for Relief From Judgment (filed Aug. 11, 1986), in a ruling read from the bench. This memorandum supplements the oral ruling of August 19, 1986.

The previously published decisions in this case, 591 F.Supp. 403 (D.Conn.1984) *(Wilkinson I)*, 639 F.Supp. 518 (D.Conn.1986) *(Wilkinson II)*, did not prevent the defendants from "seeking relief from the prospective effect of [the] decision if future Ku Klux Klan ('Klan') rallies depart so substantially from past rallies as to suggest that order can no longer be maintained without the use of more intrusive measures [,]" *Wilkinson II* at 531. The court assumes for the argument that, despite the pendency of an appeal of its June 30, 1986 order of injunction, it might, in some circumstances, modify that order to permit the defendants to undertake the suggested "magnetometer" searches. *See* Letter from Lieut. John J. Rearick to Assistant State's Attorney Carl Schuman, (dated Aug. 6, 1986), *attached to* Defendants' Memorandum In Support of Motion for Relief From Judgment (filed Aug. 11,

1986). *But see* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Relief from Judgment (dated Aug. 18, 1986) at 2-7, 13-15 and authorities cited therein. The court also assumes for the argument that the proposed search of all persons attending the East Windsor Klan rally by the use of magnetometers is less intrusive than the universal "pat-down" body search that the defendants would prefer to undertake.

1. At the August 19, 1986 hearing, the defendants indicated they would produce evidence that the projected August 30-31, 1986 rally in East Windsor, Connecticut presented circumstances substantially different from those of the earlier Klan rallies that were the subject of the original trial before the court. *See Wilkinson II* at notes 6 to 13 and accompanying text. The evidence presented by the defendants at the hearing, however, simply does not support a finding that the East Windsor rally "depart[s] substantially from past [Klan] rallies [in Connecticut]." Nor does the evidence presented at the hearing of August 19, 1986 indicate that the court's findings of fact in *Wilkinson II* were erroneous in any particular respect. The East Windsor rally is expected to attract at most about 75 Klansmen and it is to be held on the private property of one Edwin Thrall. In view of the availability of other crowd-control techniques, discussed below, no persuasive evidence was presented at the August 19, 1986 hearing to support a finding that indiscriminate searches of persons and automobiles at this rally are necessary in order to prevent violence — or that there is a justification for a modification of the June 30, 1986 order to permit the less intrusive, but equally indiscriminate, magnetometer search of all persons attending the rally.

[1, 2] In other words, it may indeed be arguable in the abstract that a magnetometer search of all persons attending a particular political rally can withstand constitutional scrutiny. For instance, such searches might be warranted if the threat of violence at a particular rally was so clear and substantial that use of more conventional law enforcement

mechanisms, including those noted below, would be unlikely to succeed in maintaining order and ensuring the public safety, or if the evidence demonstrated that a large group of people might be jeopardized in some extraordinary way. *See, e.g., United States v. Albarado*, 495 F.2d 799 (2d Cir.1974) (threat posed by hijackers and terrorists to air travelers). However, the evidence presented in this particular case, and the record of available alternative law enforcement measures, does not support a decision to permit such searches in the absence of "specific and articulable" facts to support a reasonable belief that a particular individual poses a threat to public safety. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879–80, 20 L.Ed.2d 889 (1968), or probable cause to believe that the individual is violating the law (including, for example, the state court ban on the possession of weapons at the rally).

The court previously found that there have been no violent incidents at any Klan rally held in Connecticut involving the use of weapons such as those that might be detected through the use of magnetometers. In fact, the only violent incidents to occur at any Connecticut Klan rallies took place at the first three rallies. These incidents involved fists, rocks and bottles; they were not initiated by Klan members, nor did Klan members participate in them. Moreover, those incidents were substantially attributable to the failure of law enforcement officials to use appropriate crowd-control techniques. *See Wilkinson II*, at notes 40 to 55 and accompanying text. The court has found that the adoption of such techniques at later rallies markedly improved police performance. *Id.* at notes 52 to 56 and accompanying text; *see also id.* at 531. At the hearing of August 19, 1986, the defendants produced no persuasive evidence that there was any greater risk of violence at the August 30–31, 1986 rally than at previous Klan rallies held in Connecticut. Accordingly, the circumstances in this case have not changed substantially since *Wilkinson II*, and there is therefore no basis for modifying the injunction entered at that time.

The Court of Appeals has noted that "[e]ven the unintrusive magnetometer walk-through is a search in that it searches for and discloses metal items within areas most intimate to the person where there is a normal expectation of privacy." *United States v. Albarado, supra,* 495 F.2d at 803 (citation omitted). Indeed, in describing the airport magnetometer searches, the Court of Appeals has observed that "[e]ach aspect of the procedure is . . . a search within the meaning of the fourth amendment." *Id.* The airport magnetometer search procedure, like the magnetometer search procedure contemplated in this instance by the defendants, is "carried out upon each and every [person seeking entry to a particular site] without a warrant and without probable cause," *id.,* "and is subject to the fourth amendment's requirement of reasonableness [,]" *id.* As the Court of Appeals well noted in *Albarado,*

> The ultimate standard of the fourth amendment on which we must base our opinion . . . is one of reasonableness . . . And the reasonableness of a search depends upon the facts and circumstances . . . of each case. . . . Our inquiry . . . must be directed to the basic issue whether in the totality of circumstances . . . a search is reasonable.

Albarado, supra, 495 F.2d at 804 (citations omitted). No judicial authority has been brought to the court's attention which authorizes the indiscriminate use of magnetometers to screen all persons attending a political rally, over the objections of the conveners of the rally. The existence of an unchallenged court order banning weapons from the vicinity of the rally site does not provide a basis for a search that would otherwise be dubious, any more than the existence of a statutory weapon ban (*e.g.,* New York City's Sullivan Law) would authorize a political subdivision to require magnetometer "pass through" searches of all citizens.

[3] 2. It is well worth noting, however, that nothing in the court's various rulings of June 30, 1986 and August 19,

1986 in any way restricts or inhibits the defendants' ability to use other crowd-control techniques with which state and local police officials are now fully familiar, including enforcement of a state court order (secured, indeed, with the consent of the plaintiffs) banning weapons within 3000 feet of the rally site; court-ordered public notice of the weapons ban; a strong and visible police presence; and the separation of Klan forces from anti-Klan forces (by restricting each group to designated areas of the rally site). *See Wilkinson II* at notes 51 and 55 and accompanying text. In addition, the defendants may conduct weapons searches of individuals as to whom there is probable cause to believe that they are carrying weapons or that they are otherwise violating the law (including the state court's order on weapons).[1] Moreover, although the court has not been called upon to consider the issue, "[q]uestioning of all oncoming traffic at roadblock-type stops[,]" *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979) and, in particular, questioning persons with regard to compliance with the state court's order banning weapons from the vicinity of the rally site, may be permissible. If lawful questioning were to present law enforcement officers with "specific and articulable" facts to support a reasonable belief that a particular individual posed a threat to public safety, *Terry v. Ohio*, *supra*, 392 U.S. at 21, 88 S.Ct. at 1879–80, or probable cause to believe that that individual was violating the law (including the state court order banning weapons), the officers would, of course, be entitled to conduct an appropriate search, including a "pat-down" search.

The findings above, and those included in the oral ruling of August 19, 1986, are entered pursuant to Rule 52, Fed.R.Civ.P.

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[1] It is noteworthy that the defendants have deliberately avoided seeking a warrant to search the premises or person of Edwin Thrall, the one person whose public statements suggest the existence of probable cause to believe that he is violating the law or intends to violate the law, *see* Transcript of State Court Proceedings (August 12, 1986) at 5–9 and Transcript of Federal Court Proceedings of August 19, 1986, while seeking this court's imprimatur for indiscriminate searches of persons as to whom no such probable cause exists.

Opinion of the United States Court of Appeals for the Second Circuit (832 F.2d 1330 (2d Cir. 1987))

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 352—August Term, 1986

(Argued November 10, 1986 Decided November 9, 1987)

Docket No. 86-7631

BILL WILKINSON and JAMES FARRANDS,

Plaintiffs-Appellees,

—v.—

LESTER FORST, DONALD LONG, AUSTIN MCGUIGAN and the CITY OF MERIDEN,

Defendants-Appellants.

Before:

KAUFMAN, WINTER and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut enjoining defendants from conducting searches at rallies held in Connecti-

cut by the Invisible Empire of the Knights of the Ku Klux Klan in the absence of reasonable suspicion or probable cause, and awarding nominal damages against certain defendants. Reversed and remanded with direction to modify injunction; award of nominal damages reversed as to defendants Forst and Long, and reversed and remanded as to City of Meriden.

SHELLY WHITE, Hartford, Connecticut (Martha Stone, Connecticut Civil Liberties Union Foundation, Hartford, Connecticut, of counsel), *for Plaintiffs-Appellees.*

MATTHEW HOROWITZ, Springfield, Massachusetts, *for Plaintiffs-Appellees.*

CARL SCHUMAN, Senior Appellate Attorney, Assistant State's Attorney, Office of the Chief State's Attorney, Division of Criminal Justice, Wallingford, Connecticut (Joseph I. Lieberman, Attorney General, State of Connecticut, Stephen J. O'Neill, Assistant Attorney General, Richard T. Biggar, Assistant Attorney General, John J. Kelly, Chief State's Attorney, Scott J. Murphy, Assistant State's Attorney, James J. Szerejo, Halloran, Sage, Phelon & Haggerty, of counsel), *for Defendants-Appellants Lester J. Forst, Commissioner of Public Safety, and Donald Long, former Commissioner of Public Safety, of the State of Connecticut.*

JOHN M. MASSAMENO, Assistant State's Attorney, Senior Appellate Attorney, State of Connecticut (Thomas H. Hrusa, Roseanne Wagner, Mitchell Goldklang, Law Student Interns, of counsel) *for Defendant-Appellant Austin J. McGuigan, former Chief State's Attorney of the State of Connecticut.*

Corporation Counsel, City of Meriden, *for Defendant-Appellant City of Meriden.*

MAHONEY, *Circuit Judge*:

Defendants appeal from a judgment of the United States District Court for the District of Connecticut (Jose A. Cabranes, *Judge*) enjoining them from indiscriminately searching persons and automobiles at rallies held in the State of Connecticut by the Invisible Empire of the Knights of the Ku Klux Klan ("Klan") in the absence of either (1) "specific and articulable" facts to support a reasonable belief that a particular individual poses a threat to public safety, *Terry v. Ohio*, 392 U.S. 1, 21 (1968), or (2) probable cause to believe that the individual is violating the law (including a valid ban on the possession or display of weapons at rallies), and further adjudging the defendants Long, Forst, and the City of Meriden jointly liable to each of the plaintiffs for one dollar in nominal damages on account of infringement of their constitutional rights.

The opinion below is reported at 639 F. Supp. 518 (D. Conn. 1986). In an earlier opinion, *Wilkinson v. Forst*, 591 F. Supp. 403 (D. Conn. 1984), Judge Cabranes denied defendant McGuigan's motion for summary judgment and his motion to dismiss on grounds of standing, mootness, and ripeness. An opinion denying post-trial motions for a stay of proceedings pending appeal or for relief from judgment is reported at 656 F. Supp. 710 (D. Conn. 1986). Familiarity with the opinions below is assumed.

Plaintiffs are current or former Klan officers, and defendants are current and former Commissioners of Public Safety of the State of Connecticut, the former Chief State's Attorney,[1] and the City of Meriden, Connecticut.

We reverse and remand with a direction to modify the injunction entered below to allow general magnetometer searches at future Klan rallies in Connecticut without regard to standards of reasonable suspicion or probable cause, reverse the award of nominal damages against Lester Forst and Donald Long, and reverse and remand with respect to the award of nominal damages against the City of Meriden.

Background[2]

This lawsuit results from sixteen rallies conducted by the Klan in Connecticut from September 13, 1980

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1 The present and former Commissioners of Public Safety, defendants Forst and Long, are sued in their individual and official capacities. Defendant McGuigan, the former Chief State's Attorney, is sued only in his official capacity. Second Amended Complaint ¶¶ 6-8.

2 Many of the facts recited hereinafter were stipulated between the parties.

through April 29, 1984,[3] and searches conducted by Connecticut authorities in connection therewith. The district court found that the Klan intends to conduct future rallies in Connecticut, plaintiffs plan to participate in those rallies, and defendants can be expected to seek court orders similar to those obtained prior to previous rallies and to search all persons attending future rallies, *see* 639 F. Supp. at 524, unless precluded from doing so as a result of this litigation.

In the summer of 1980, officials of the Connecticut State Police ("CSP") learned that the Klan was planning to hold a rally on September 13, 1980 in the small rural community of Scotland. This was to be the first Klan-affiliated rally in Connecticut in about half a century, and was scheduled to take place approximately one year after several people were killed in a clash between a Klan faction and opposing groups in Greensboro, North Carolina.[4] News of the Klan rally prompted various individuals and groups, including the International Committee Against Racism ("INCAR"), to plan counter-demonstrations in Scotland. Some of these groups had a predilection for hostile confrontation with the Klan and the police.[5]

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3 Two other rallies were conducted prior to trial, and at least one thereafter, but the parties stipulated to present no evidence concerning these later rallies except, as to the two rallies which preceded the trial, with respect to plaintiffs' standing. *See* 639 F. Supp. at 520 n.6.

4 It is undisputed that plaintiffs belong to one of several Klan factions that exist throughout the nation, and that the Connecticut Klan is not the same organization that was involved in the Greensboro incident.

5 For example, CSP Major Joseph A. Perry, Jr., who is black, testified as follows concerning a conversation with an INCAR representative on September 12, 1980, the day before the initial Scotland rally:

Q. Can you tell us what was said in that conversation?

(footnote continued)

Moreover, Klan members expressed an intention to arm themselves for purposes of self-defense, and plaintiff Wilkinson's armed bodyguards were scheduled to attend the rally. Reliable information from an undercover agent of the United States Treasury Department indicated that INCAR members would be armed (though not with firearms) and ready to attack Klansmen. Several neighborhood residents heard gunfire emanating from the private property on which the Klan rally was to be held in the days preceding the scheduled rally.

Against this background, state and local authorities sought (*ex parte*) and obtained a state court injunction banning the "carrying on one's person or in a motor vehicle [of] a firearm or other dangerous weapon" within the boundaries of the Town of Scotland on the days of the rally, absent specific authorization from Scotland authorities.[6] The injunction was enforced by establishing various checkpoints on main roads leading into Scotland, within the town, and just outside the rally site. At the checkpoints, motorists and pedestrians were informed

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A. I related to them at the time that I had met with Mr. Wilkinson that previous day.

Q. And what did Mr. Swartz [the INCAR representative] say to you?

A. That he was amazed that I was a black armed with a gun and did not shoot Mr. Wilkinson; that I was almost duty bound to do this type of thing.

Tr. p. 854.

6 Under Connecticut law, persons may carry handguns or knives if they have a permit. A permit is not needed to carry a shotgun or rifle, but loaded shotguns and rifles may not be carried in motor vehicles. *See* Conn. Gen. Stat. §§ 29-35, 53-205, and 53-206 (1985). We are not presented with any contention that this state court injunction, or similar successor injunctions involved in this case, impermissibly narrowed the right to bear arms afforded by pertinent Connecticut statutory law.

that they were "subject to search"[7] if they proceeded to the vicinity of the rally. The decision whether or not to search was within the discretion of individual officers, and the officers did not feel constrained by standards of probable cause or reasonable suspicion. Motorists and pedestrians were told that they would not be subject to search if they avoided the area of the rally. The searches produced seven firearms, fifty-four rounds of ammunition, forty-one knives, two swords, two machetes, five baseball bats, three pieces of pipe, eight lengths of chain, two cans of mace, three sling shots, one set of weighted knuckles, a detonator, and a number of clubs.

Although the rally itself occurred without incident, members of Citizens Against Racism, during an attempt to march to the rally, attacked people in the area outside the rally site with fists, rocks, sticks, and flagpoles, resulting in injuries to a number of persons.

The next demonstration relevant to this lawsuit took place on March 21, 1981 in Meriden ("Meriden I"). It was a planned march to and from City Hall. The State did not attempt to search all persons and vehicles at checkpoints on a less than probable cause basis, and no court order was sought or obtained. The demonstration was attended by fifty police officers, twenty-one Klansmen, 1,500 to 2,000 spectators and press, and a substantial number of anti-Klan demonstrators. As Klan members arrived at the City Hall steps, they were attacked with rocks and bottles thrown by anti-Klan forces. A person with a bullhorn advocated violence against the Klan and the police. Fist fights broke out among various groups in the crowd, and automobile windows were smashed. As the police at-

[7] Unlike the later state court orders in this case, the Scotland order included no express authorization of searches.

tempted to escort the Klan out of the area, demonstrators pelted the Klan and the police with rocks, bottles, boards, clubs, and bricks. Two people used a building block to strike plaintiff Farrands' daughter on the back. At some point during the demonstration, Klansman Clyde Dick was restrained by the police when he attempted to draw a revolver from his coat pocket. Twenty policemen, six Klansmen, and one bystander received injuries. Many of the officers were hit with rocks or bricks. One female Klan member suffered head lacerations and injuries to the skull, while another was rendered semiconscious by a blow to the head.

The next demonstration ("Meriden II") took place in Meriden on July 11, 1981. It was to be held in a public square. Once again, the State sought no court order banning weapons or authorizing searches. One hundred and three police officers, twenty-five Klansmen, a substantial number of anti-Klan forces, and about seven hundred spectators and press were in attendance. The Klansmen were subjected to pat-down searches, to which they allegedly consented, prior to the rally. The searches uncovered two pistols with valid state permits and several axhandles, sticks and pocketknives, all of which were confiscated by the police. The police disarmed a group of anti-Klan demonstrators whom they observed gathering and carrying rocks, sticks and clubs.

This rally ended before it began. As soon as the Klan, escorted by police, appeared on the square, INCAR members commenced throwing rocks, bottles, and tin cans in their direction. Several fist fights broke out within the crowd. Police halted the rally promptly and ordered the area cleared. Three officers and one Klansman were treated for injuries.

After the Meriden II rally, state officials decided upon a new course of action to prevent outbreaks of violence. For the Windham rally of October 10-11, 1981, and for the subsequent twelve rallies involved in this lawsuit, the relevant authorities sought state court injunctions banning the carrying of firearms or other dangerous weapons on and around the rally sites and permitting searches of persons attending the rallies. The order banning weapons typically extended only to the rally site and the immediate vicinity. The language authorizing searches generally followed that used in the Windham order, which provided:

> All persons entering the designated area will be advised of the injunction and the option of leaving the area with their weapons. *Those who choose to enter the designated area will be questioned concerning their possession of weapons and, where appropriate, a frisk for weapons will be performed.* All lawfully possessed weapons held pursuant to the injunction will be tagged and returned to the lawful owners upon their exit from the designated area.[8]

Emphasis added. All of the State's applications for injunctive relief were granted, with the sole exception of the application for an injunction at the Canterbury rally held on August 14, 1982.

The court orders typically prohibited the carrying of firearms or other dangerous weapons on one's person or in a vehicle within the designated area, although only the order pertaining to the rally held at Groton on April 29, 1984 specifically authorized vehicle searches. When the subject came up at the court hearings where injunctions

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8 Several of the later orders enjoined the possession of "firearm[s] or other dangerous weapons *or instruments*" (emphasis added) at the rallies. *See* 639 F. Supp. at 521 n.18.

were sought, it was made clear that the applicants were seeking authority, and intended, to search any automobiles which entered the area to which the injunction applied.

As to personal searches, the opinion below concludes that nothing in these orders authorized the police to conduct searches or frisks on a less than probable cause or reasonable suspicion standard. *See* 639 F. Supp. at 530. Whatever the merits of this conclusion as a matter of textual construction, the record demonstrates that at the state court hearings at which injunctions were sought, the public authorities again made it clear that they were seeking the authority, and indeed were intending, to search all persons who proceeded into the areas to which the injunctions applied.

The reader is referred to the district court's opinion for an exhaustive treatment of the various rallies and searches. Suffice it to say, for present purposes, that no major disruptions marked the Klan rallies after the state began its search policy. (We note that no major disruption occurred at the Canterbury rally either, where a court order was not in effect and personal searches were not authorized or conducted.) Defendants concede that their handling of the rallies improved over time, and that increased police presence, the separation of contending factions, the choosing of more appropriate sites, and pre-rally sweeps of the demonstration sites helped improve security at the later rallies. There were very minor incidents away from the rally sites at two of the remaining rallies.

The district court found, and it is clear from the record, that "all or virtually all persons were stopped and searched" by officers before entering the rally sites. *See*

639 F. Supp. at 521-22. The CSP was involved, to varying degrees, with local police forces in maintaining order at the rallies. It is conceded that attendees were given the choice of submitting to the pat-down searches or leaving. Hand held magnetometers were used, in conjunction with pat downs, at the Norwich and West Haven rallies, but the record is unclear as to which police force owned or leased the machines and why they were only used at two of the rallies. Those persons setting off the magnetometers were immediately patted down, and were not given the option of leaving the rally site.

It is uncontested that some of the automobile searches were exceedingly thorough, and that certain Klansmen were searched both entering and leaving the rally site at Danbury, despite pre-rally clearance of the site by authorities. Further, plaintiffs Wilkinson and Farrands were rather thoroughly searched, apparently to the point of harrassment, on several occasions. At some rallies, some persons were subjected to full clothing searches that went beyond the classic pat-down frisk. The defendants do not attempt to justify these searches, but maintain, correctly we think on this record, that the overwhelming majority of the searches were ordinary frisks.

The kinds of weapons or potential weapons confiscated by the police at the rallies are indicated by some of the items seized at Danbury: three clubs, fifteen shells, twenty-seven knives, seven axes, a pick, two pitchforks, eleven ax or hammer handles, twenty-three arrows, two hatchets, five sheaths, four tomahawks, six machetes, two shillelaghs, four rubber hose pieces, three tear gas containers, two pellet guns, a BB gun, two spears, a lead pipe, a chain with lead weights, an Indian head club, a metal pike, a blackjack, a crossbow, a whip, a flare-

launcher, and a wooden stake. In fairness, it should be added that some of these items were taken from the property on which the rally was to be held.[9] But similar items were confiscated at other rally sites, such as Windham, where police confiscated mace, claw hammers, tire irons, baseball bats, scissors, razors, screwdrivers, bottles, an ice pick, a steel bar, and the like.[10]

The record is clear that the Klan was generally cooperative with state and local police forces, and did not explicitly incite any violence. Nevertheless, the Klan, in the course of publicizing its rallies, made known its intention to arm its members for purposes of self-defense. Moreover, the Klan, due to its history and methods of publicizing rallies, tends to incite other actors in the political community.

Shortly after the State implemented its search policy, plaintiffs brought this action pursuant to 42 U.S.C. § 1983 (1982), alleging that the State policy of conducting searches without individuated probable cause or reasonable suspicion violated their rights under the first, fourth, and fourteenth amendments to the United States Consti-

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9 We have not included in the above tabulation a machine gun and approximately thirty rifles which were seized from the owner of the property. The district court opinion stated that firearms were confiscated at only two of the rallies, including Danbury, *see* 639 F. Supp. at 522 & n. 35, but this tabulation does not take into account the confiscation of firearms at Scotland and Meriden II described *supra* at 8-9.

10 The exhibits at trial do not itemize everything that was seized at every rally, but there seemed to be a decline in the quantity of items seized at the later rallies. *Compare United States v. Albarado*, 495 F.2d 799, 804 (2d Cir. 1974) (decline in airplane hijackings resulting from airport search policies).

tution. Plaintiffs do not challenge the propriety of the orders banning the carrying of weapons, or the police policy of separating contending forces at the rallies.

The defendants countered that the frisks were reasonable under the circumstances, similar in nature to searches performed in courthouses and airports. According to defendants, the searches serve the vital state function of protecting life and property, and in fact foster first amendment freedoms by allowing the Klan rallies to proceed in peace.

At trial, plaintiffs relied heavily upon the expert testimony of Robert W. Klotz, a retired Deputy Chief of Police in the District of Columbia with extensive experience in crowd control techniques. Chief Klotz testified that in his opinion, order had been maintained at the Connecticut Klan rallies after Meriden II due to procedures such as increased police presence, crowd separation, pre-rally clearance of sites, and improved choices of rally locations. Chief Klotz did not think that the policy of mass pat-down searches contributed significantly to the restoration of order at Klan rallies. On cross examination, however, Chief Klotz conceded that the method employed to handle the rallies was not necessarily incorrect, that it was reasonable to infer that the court orders permitting searches contributed to the success of the later rallies, and that it was reasonable to infer that people brought fewer weapons to rally sites after Meriden II because they knew that they would be searched. In this connection, he specifically testified:

> Q Would you agree that at least some people would be deterred from carrying weapons because they knew they were going to be searched?

A Yes, I would agree with you.

Q In fact, the only demonstration after Meriden II in which there was not a court order was the Canterbury rally; isn't that correct?

A Yes, sir.

Q And in that there were some 30 shotguns, rifles seen in the hands of Klansmen?

A I believe that's correct.

Q So, doesn't that suggest that the reason that the guns weren't seen at the later rallies is because there was this court order and the searches being conducted?

A I think it naturally follows, yes, sir.

Tr. pp. 581-82.

Defendants relied primarily on the testimony of several officers in the CSP to the effect that the court orders and searches greatly facilitated the maintenance of order at Klan rallies. These witnesses also testified that it was often difficult completely to separate antagonistic forces at the rallies, because it was hard to determine who was a spectator and who was an anti-Klan activist.

The Decision Below

In its fourth amendment analysis, the court below saw its duty as " 'balancing . . . the need for the particular search against the invasion of personal rights that the search entails[,]' " taking into account " 'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it

is conducted.' " *Wilkinson*, 639 F. Supp. at 524-25, (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). The court first examined the need for the searches. While acknowledging that the maintenance of order at public events is an important state function, the court saw little need for the searches at issue here, because the purpose of the searches could be achieved by less intrusive means such as "deployment of an adequate number of law-enforcement officers, the mastery of traditional crowd-control techniques, . . . and the use of reasonable time, place and manner restrictions that may require, for example, that rallies be held at sites where security can be more easily assured and that Klan forces be separated from anti-Klan forces at the rallies." 639 F. Supp. at 525. In reaching this conclusion, the court credited completely the testimony of Chief Klotz.

The court next considered the scope of the intrusions at issue and the manner in which they were conducted, and found the pat-downs and baggage and automobile searches to be substantial invasions of privacy. Judge Cabranes recognized that the personal searches which went beyond the court authorized pat-downs were probably not ratified or approved by the defendants, but noted that "these incidents illustrate the disregard of privacy interests that can result from an official policy that permits indiscriminate searches." *Id.* at 527.

The court then considered the places where the searches occurred, and concluded "that the fact that most of the searches occurred at traditional public forums that were being used for expressive activity weighs against the constitutional validity of the searches." *Id.* at 528. The court rejected the state's attempt to analogize searches at Klan rallies to those at airports and courthouses or to

border searches. As to airport and courthouse searches, the court noted the typical absence of law enforcement officers on airplanes or in courtrooms, the special dangers posed by an airplane bombing or hijacking, and the unique security concerns relating to courtrooms where criminal cases are tried. As to border searches, the court observed that such searches have always been considered *sui generis*. *See id.* at 528.

Considering all these factors, Judge Cabranes found the searches at issue incapable of passing constitutional muster under the fourth amendment. He therefore found it unnecessary to consider plaintiff's first amendment claims. The district court did consider, however, and reject, plaintiff's due process claim under the fourteenth amendment, which rested primarily upon a purported denial of "meaningful appellate review" because the state court orders were sought shortly before the rally dates. The district court found that the state court orders themselves did not deprive plaintiffs of any constitutional rights because, as noted earlier, Judge Cabranes concluded that the orders did not authorize the searches which in fact occurred. Finally, the court rejected the defendants' claims of qualified immunity, holding that their conduct violated clearly established fourth amendment principles, and therefore awarded nominal damages against defendants Forst, Long and the City of Meriden.

Discussion

It is ironic, as noted by Judge Cabranes in his first *Wilkinson* opinion, 591 F. Supp. at 405 n.2, that plaintiffs are proceeding under 42 U.S.C. § 1983 (1982), the original first section of the Ku Klux Klan Act of April 20,

1871. The Act was passed in an effort to protect freedmen and loyal whites from deprivation of their Constitutional "rights, privileges, or immunities" at the hands of the Ku Klux Klan and cognate groups. The Connecticut Klan now contends that defendants are abridging their first, fourth, and fourteenth amendment liberties, thereby violating that statute, through the implementation of mass pat-down searches. Yet another irony is found in the defendants' argument that they are in fact protecting the first and fourteenth amendment rights of the citizenry by allowing the Klan rallies to proceed in peace.

It is well settled first amendment law that free speech rights cannot be denied because of the unpopularity of the views expressed. *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963). Thus, a public authority is usually not in a position to ban a Klan rally on the theory that it will arouse community opposition. In fact, municipal efforts to ban Nazi and Klan rallies have regularly met with judicial disapproval. *See e.g.*, *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

States and municipalities are thus compelled to spend significant sums of money to preserve order and prevent violence at these rallies. With respect to the Klan, moreover, the organization sponsoring the rally has a history of violence and of provoking violence in its opponents. In the instant case, Connecticut authorities had specific information that the rallies at issue could potentially erupt into violence.

Defendants are not contending that they have the right to conduct blanket searches at all political rallies or at all political rallies where violence is anticipated, or at all Klan rallies or functions. Rather, they maintain that when

an organization with a historically demonstrable penchant for violence plans a rally which is to be attended by opposition groups who have historically clashed with the sponsoring organization, *and* public authorities obtain information that both sets of groups anticipate violence, those authorities, who have a duty to provide protection and maintain order at such rallies, may conduct pat-down searches of all those attending the rally.

However understandable the difficulties which Connecticut public authorities confront in dealing with Klan rallies, their conduct must nonetheless be measured against the constitutional standards of the fourth amendment, which prohibits "unreasonable searches and seizures." We agree with the district court that the test of the "reasonableness" of a search under the fourth amendment is well stated in *Bell v. Wolfish*, 441 U.S. 520 (1979), which "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails[,]" and calls for consideration of "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559.

We confess some disagreement with the initial prong of the analysis undertaken by the district court in applying the *Bell v. Wolfish* criteria to the facts of this case. Addressing the need or justification for the searches under review in this litigation, the district court concluded, "based on the expert testimony of Chief Klotz and the other evidence presented at trial, that mass searches of persons and automobiles are not necessary or even particularly helpful in preventing violence at Klan rallies in Connecticut." 639 F. Supp. at 525. The district court found that the deployment of an adequate number

of law enforcement officers, mastery of traditional crowd control techniques (including searches based upon individualized suspicion), and reasonable time, place and manner restrictions, including site selection and separation of opposing forces at rallies, have sufficed and will suffice to maintain order at Klan rallies. *Id.*

We recognize that this conclusion was expressed as, and in fact constitutes, a finding of fact; that we are required by Fed. R. Civ. P. 52(a) to defer thereto "unless clearly erroneous," *see Anderson v. City of Bessemer City*, ____ U.S. ____, ____, 105 S. Ct. 1504, 1511-13 (1985); and that this deference must extend to ultimate, as well as subsidiary, findings. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Lyddan v. United States*, 721 F.2d 873, 875 (2d Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *Snyder v. Four Winds Sailboat Centre, Ltd.*, 701 F.2d 251, 253 (2d Cir. 1983). We further recognize the district court's reliance upon Chief Klotz's expert testimony on this subject, and the special deference mandated by Rule 52(a) with respect to a trial judge's credibility determinations. *See Anderson*, ____ U.S. at ____, 105 S. Ct. at 1512-13.

In this case, however, Chief Klotz made a clear concession on cross examination, quoted *supra* at 15-16, that (1) at the only rally where a court order was denied and no searches were conducted, Klansmen attended with about thirty shotguns and rifles, and (2) it "naturally follow[ed]" that "the reason that the guns weren't seen at the later rallies is because there was this court order and the searches were being conducted." It accordingly follows that, whatever the efficacy of the other techniques emphasized by the district court and Chief Klotz in generally preserving order and preventing physical con-

frontations at the later Klan rallies, the court orders and searches played an important role in inhibiting the Klan members from bringing firearms to those rallies. On this record, especially in light of the Klan's stated intentions to bring firearms to their public rallies and use them in self defense if necessary, such inhibition is a legitimate and important objective.[11] In its findings, conclusions and evaluations concerning this question, we accordingly conclude that the district court gave inadequate weight to the need or justification for the searches at issue here.

This, of course, does not resolve the issue presented to us, especially since we are in accord with the district court concerning the intrusiveness of these searches. *See e.g.*, *Terry v. Ohio*, 392 U.S. 1, 16-17 & n. 13 (1968). On the other hand, we do not conclude nearly as forcefully as did the court below that the places where these searches occurred militate strongly against the searches conducted. Some of the sites in question, public streets and so forth, are indeed traditional public forums within the meaning of relevant first amendment jurisprudence. The district court weighed this factor heavily in denying the relevance of cases that have allowed indiscriminate searches at such locations as prisons, military installations, airports and courthouses.

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11 As the district court noted, 639 F. Supp. at 522 n.21, searches of attendees at Klan rallies would not preclude the use of firearms to fire into the rally by hostile elements who remained outside the rally site. Given the impracticality and enhanced intrusiveness of a general search of all spectators and the expressed intentions and history of the Klan as to firearms, however, a legitimate law enforcement purpose would be served by measures to prevent the introduction of weapons to the site itself, even in the absence of efforts to inhibit by searches the presence of firearms in all surrounding or adjacent areas.

It is true that the constitutional right to free speech is implicated here; but the constitutional right to interstate travel is also implicated in airport searches, as is the constitutional right to attend public trials in courtroom searches. The key factor in the cases allowing such searches was the perceived danger of violence, based upon the recent history at such locations, if firearms were brought into them. *See e.g.*, *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (airport search); *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974) (airport search); *McMorris v. Alioto*, 567 F.2d 897, 899-900 (9th Cir. 1978) (courthouse search); and *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (courthouse search).[12]

We believe that the rationale of these cases is not properly confined to the specific locations at issue therein. Searches were not conducted at those locations until the onset of airplane hijackings and courtroom violence presented a perceived need for preventive measures to be taken. Where such a need is legitimately presented in another context, we do not believe that public authorities should be considered powerless to respond to it in an effective manner, or that such a need cannot legitimately be weighed in the constitutional balance in evaluating searches under the fourth amendment.

Rejecting a similar contention in a fourth amendment context, the Supreme Court said in *Donovan v. Dewey*, 452 U.S. 594 (1981): "Under appellees' view, new or emerging industries . . . could never be subject to war-

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12 The courthouse searches are particular applications of General Service Administration regulations relating to federal buildings in general. *Downing*, 454 F.2d at 1231. *See* 41 C.F.R. §§ 101-20.301 and 101-20.313 (1986).

rantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation. The Fourth Amendment's central concept of reasonableness will not tolerate such arbitrary results. . . ." *Id.* at 606. So here, the recent vintage of the problem posed by hostile confrontations at Klan rallies in Connecticut should not weigh unduly in the balancing evaluation mandated by the fourth amendment's concept of reasonableness.

On the other hand, the airport and courtroom cases have sanctioned only magnetometer searches in the first instance. In *Albarado*, for example, the recommended procedure was to have the passenger pass through a standing magnetometer, remove any metal objects if he activated the device, and pass through the magnetometer a second time before being subjected to a frisk. *Albarado*, 495 F.2d at 808-09. It was further suggested that a hand-held magnetometer be utilized, if available, for the second sweep. *Id.* at 809. Although none of these procedures were mandated, the rule was stated in the following terms: "*the frisk* in the typical boarding situation we have been talking about *is to be used only in the last instance.*" *Id.* (emphasis in original).[13]

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13 The holding in *Albarado* was premised upon "*a constitutional requirement that to be reasonable the search must be as limited as possible commensurate with the performance of its functions.*" *Albarado*, 495 F.2d at 806 (emphasis in original). As a general rule, this is undoubtedly no longer good law. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983) (reasonableness of particular governmental activity does not necessarily or invariably turn on existence of alternative less intrusive means) (police station search), and cases there cited; *see also United States v. Sharpe*, ____ U.S. ____, ____, 105 S. Ct. 1568, 1576 (1985) (question is not simply whether some other alternative was available, but whether police acted unreasonably in failing to recognize or pursue it) (pre-arrest detention). Nonetheless, we agree

Albarado's allowance of general magnetometer screening in the first instance without a warrant or probable cause, despite the fact that these screenings constitute fourth amendment searches, *see id.* at 803, was based upon the "great threat to hundreds of persons" posed by an airplane hijacking and the "absolutely minimal invasion in all respects of a passenger's privacy" occasioned by passing through a standing magnetometer. *Id.* at 806. As we there explained:

> The passing through a magnetometer has none of the indignities involved in . . . a frisk. The use of the device does not annoy, frighten or humiliate those who pass through it. Not even the activation of the alarm is cause for concern, because such a large number of persons may activate it in so many ways. No stigma or suspicion is cast on one merely through the possession of some small metallic object. Nor is the magnetometer search done surreptitiously, without the knowledge of the person searched. Signs warn passengers of it, and the machine is obvious to the eye.

Id.

A similar analysis is appropriate here. On balance, we agree with the district court that the indiscriminate pat-down searches conducted here were excessive. As indicated earlier, we are not in total agreement with the analysis by which Judge Cabranes reached this conclusion. Nonetheless, taking into account the existing law, the weight legitimately to be accorded to Chief Klotz's

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with the district court, *see* 639 F. Supp. at 525 & n.58, that the consideration of alternative means that might have been employed remains a legitimate factor in fourth amendment analysis.

testimony and the district court's findings based primarily thereon, the intrusiveness of these pat-down searches (even aside from those which defendants concede were excessive and improper), and the asserted primary purpose of the searches to eliminate firearms from the rally sites,[14] we agree with the district court's conclusion that the mass pat-down searches conducted at these Klan rallies went beyond the bounds established by the fourth amendment.

On the other hand, we cannot agree that an injunction requiring individuated suspicion or probable cause for all searches at future Klan rallies is required. Rather, we conclude that the injunction should allow magnetometer searches of persons and packages at such rallies,[15] followed by frisks where the magnetometer indicates the presence of metal and the situation cannot be resolved by use of the magnetometer alone. We do not see any general need for automobile searches, since it is usually practical to arrange for vehicles to be parked at a safe distance from the rally site, but we do not purport to provide a rule for all future contingencies and circumstances that may be presented to the district court.

We recognize that the primary focus of the proceedings below was the utilization of pat-down frisks, rather than magnetometers, but magnetometers were utilized at two of the rallies at issue in this litigation (Norwich, August 11, 1982, and West Haven, April 28, 1984), and the

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14 As discussed below, we believe that this objective can be adequately addressed by less intrusive magnetometer screenings at Klan rallies.

15 In light of the fact that these rallies are usually held outdoors, and absent any expertise concerning such matters as power sources or the effect of weather on magnetometer operations, we express no view concerning the employment of standing, as against hand-held, magnetometers.

existing district court injunction would clearly preclude the use of magnetometers at future rallies for general screening of the attendees for firearms. In addition, when a post-judgment application to allow the use of magnetometers at a later rally was presented to the district court, the court denied that application. *See Wilkinson v. Forst*, 656 F. Supp. 710 (D. Conn. 1986).[16]

The court's opinion in denying that application made clear, as we have just observed, that such use would violate the court's injunction. *See* 656 F. Supp. at 712. Although the Connecticut authorities on occasion discounted the effectiveness of magnetometers to deal with the situation presented by the Klan rallies, *see, e.g.*, Exhibit 246, pp. 85-87 (transcript of hearing on application for injunction relating to New Britain rally held June 25, 1983), that position was premised upon the inability

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16 No appeal was taken from that ruling, and such an appeal would undoubtedly have presented the magnetometer issue more squarely here. Nonetheless, we deem that ruling "sufficiently linked" to the judgment from which appeal was taken to warrant consideration here. *See SEC v. American Board of Trade, Inc.*, Nos. 86-6210, 87-6006, 87-6014, 87-6016, slip op. at 5477 (2d Cir. September 28, 1987); *see also Conway v. Village of Mount Kisco*, 750 F.2d 205, 211 (2d Cir. 1984) (notice of appeal construed broadly to reach order from which no appeal taken), *reaff'd*, 758 F.2d 46 (2d Cir. 1985), *cert. granted sub nom. Cerbone v. Conway*, 106 S. Ct. 878 (1986), *cert. dismissed as improvidently granted*, 107 S. Ct. 390 (1986); *Rebaldo v. Cuomo*, 749 F. 2d 133, 137 (2d Cir. 1984) (in proper case, appellate court will consider issue not raised below), *cert. denied*, 472 U.S. 1008 (1985); and *San Filippo v. U.S. Trust Co. or New York*, 737 F.2d 246, 255 (2d Cir. 1984) (doctrine of pendent appellate jurisdiction invoked to consider otherwise nonappealable issues), *cert. denied*, 470 U.S. 1035 (1985). Based upon these authorities, in fact, we deem the magnetometer issue adequately presented by the appeal from Judge Cabranes' initial judgment, without reference to the later ruling, in view of the use of magnetometers at two of the rallies at issue in this litigation and the prohibition of their use at future rallies by the judgment on appeal.

of magnetometer searches to prevent the introduction of weapons other than firearms. In our view, however, the magnetometer searches are justified for the specific purpose of keeping firearms away from rallies, and reliance must be placed upon different techniques (adequate police, separation of hostile forces, site selection and preparation, etc.) to deal with other challenges to safety and order.

Given the entire record presented here, including the stated intention and practice of the Klan to bring firearms to their rallies, the fact that a multitude of rifles and shotguns were brought by Klan members to the Canterbury rally when no court order was in effect and no searches were conducted, and the continuing potential for violent confrontations at these events, we conclude that the injunction entered below should be modified so as to exclude from its prohibition general magnetometer screenings at future Klan rallies in Connecticut. In so holding, we note, as did the district court, 639 F. Supp. at 531-32, that more intrusive measures might be justified by future events.

We turn now to the award of nominal damages. The district court concluded that nominal damages should be awarded because the defendants' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and the defendants were accordingly not entitled to qualified immunity for their conduct. The primary basis of this ruling was that no case law authorized "indiscriminate searches so intrusive of personal privacy interests to be conducted in settings other than prisons, military bases, airports and other areas with special security concerns that cannot be

adequately addressed through standard law enforcement techniques." 639 F. Supp. at 531.

With respect to defendants Forst and Long, we disagree. As indicated earlier, we do not give as much weight to the difference in sites as did the district court. We note, in addition, that applications were made to the Connecticut courts for orders banning weapons at these rallies, such orders were obtained, and whatever their proper textual construction, the defendants were justified in an objectively reasonable belief that the court orders authorized most of the searches that were conducted.[17] Finally, and in any event, we do not deem the law applicable to the unique and difficult problem presented to the defendants by these historically unprecedented Klan rallies in Connecticut so adequately clear and settled as to warrant an award of damages under the rule of *Harlow v. Fitzgerald*. *See Sec. & Law Enforcement Emp., Dist. C. 82 v. Carey*, 737 F.2d 187, 210-11 (2d Cir. 1984); *Sala v.*

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17 The applications for state court orders pursued with respect to these rallies satisfied many of the concerns to which the traditional warrant requirement of the fourth amendment is directed. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973). The Connecticut authorities might consider in the future seeking area search warrants, as well as court orders prohibiting weapons at the rally site and authorizing searches in general terms, as outlined in Justice Powell's concurring opinion in *Almeida-Sanchez*. *Id.* at 283-85 (Powell, J., concurring). The four justices who joined in the majority opinion were divided as to the constitutionality of such warrants, *see id.* at 270 n.3, and the four dissenters agreed with Justice Powell that they were constitutionally valid. *See id.* at 288 (White, J., dissenting). *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Ortiz*, 422 U.S. 891, 897 n.3 (1975); and *United States v. Jackson*, Nos. 86-1226, 86-1381, slip op. at 6190-92 (5th Cir. August 17, 1987) (in banc), *but see id.* at 6202 (Clark, C. J., specially concurring), 6203 (Garwood, J., concurring), 6204 (Higginbotham, J., specially concurring), and 6209 (Hill, J., specially concurring).

County of Suffolk, 604 F.2d 207, 209 (2d Cir. 1979), *vacated on other grounds*, 446 U.S. 903 (1980).

We reach a different result, however, concerning the City of Meriden. *Owen v. City of Independence*, 445 U.S. 622 (1980), holds that a municipality has no immunity from liability under 42 U.S.C. § 1983 (1982) based upon the good faith of its officers, even though those officers would themselves be accorded such immunity. *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), requires, however, that the action challenged as violative of section 1983 reflect the official policy of the municipality, and precludes liability based upon *respondeat superior*. *Id.* at 691-94. Since this issue has not been briefed or argued here, and was not considered below, we remand for its initial consideration by the district court.

Finally, we find no error in the district court's rejection of plaintiffs' fourteenth amendment claim respecting the timing of defendants' applications for court orders, especially since plaintiff Wilkinson explicitly testified that the Klan was in any event unable to obtain counsel to prosecute appeals from these orders and would not undertake appeals on a *pro se* basis. In addition, since the court below did not specifically decide plaintiffs' alternative claim that the challenged searches violate their first amendment rights, *see* 639 F. Supp. at 530 n. 62, we similarly do not decide that issue, although much that has been said in this opinion would obviously be relevant to its resolution.

Conclusion

The judgment below, as to the injunction, is reversed and remanded with the direction that it be modified to

allow general magnetometer searches at the sites of future Klan rallies in Connecticut without regard to standards of reasonable suspicion or probable cause. As to the award of nominal damages, the judgment below is reversed with respect to Lester Forst and Donald Long, and reversed and remanded with respect to the City of Meriden.

(3)

No. 87-1363

In The

Supreme Court of the United States

October Term, 1987

JOHN J. KELLY, Chief State's Attorney,
LESTER J. FORST, Commissioner of Public Safety,

v. *Petitioners,*

BILL WILKINSON,
JAMES FARRANDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the District Court and the Court of Appeals erred in determining that an indiscriminate policy of mass frisks at political rallies violates the Fourth and Fourteenth Amendments of the United States Constitution?

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STATEMENT OF THE CASE

Petitioners' statement of the case obscures the critical findings in this case. Those findings by the District Court, which were substantially affirmed by the Court of Appeals, amply support the ruling below. They demonstrate, as well, the factual nature of this dispute and the inappropriateness of plenary review by the Court.

The relevant portions of the record may be briefly summarized:

1. Between September 18, 1980 and April 30, 1984, the Ku Klux Klan (hereafter "the Klan") conducted sixteen rallies on public and private property in Connecticut. (Appendix to Certiorari Petition, hereafter "A." 5a).

2. The purpose of these rallies was to communicate the Klan's purposes, goals, and ideas to the public, and to recruit new members. *Id.* Several rallies concerned specific themes, such as support for local police, opposition to communism, support for nuclear submarines and opposition to integration. *Id.*

3. The Klan did not initiate or participate in any violence at any of its Connecticut rallies. (A. 10a-11a).

To the contrary, petitioners have consistently stated that their concern about violence was prompted by the actions and threats of anti Klan demonstrators. *Id.*

4. In response to this concern, petitioners initiated a policy of indiscriminate frisks at Klan rallies. (A. 7a).[1] The frisks were highly intrusive. (A. 9a-10a). Many went well beyond a routine pat-down of the outer clothing. (A. 8a). At some rallies, individuals were required to roll up their pants, remove their shoes, empty their pockets, and reveal the contents of their wallets. *Id.*

5. Numerous people were discouraged from attending Klan rallies in Connecticut by petitioners' policy of indiscriminate frisks. (A. 9a-10a). For example, at one rally in Meriden, Connecticut, police observed several hundred people leave the rally site rather than subject themselves to a police frisk. (Exhibits, hereafter "Ex." 118, 128, 140). The frisk policy was designed, in part, to achieve this result. (Ex. 55, 73 at 21)(Transcript, hereafter "Tr." 1664-65).

6. The District Court found that order can be maintained at Connecticut Klan rallies without the need to frisk each person in attendance. (A. 12a-13a). The trial record is unequivocal that police agencies in other jurisdictions regularly maintain order at political events posing comparable or greater security threats

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[1] These frisks were purportedly based on fourteen state court orders obtained by the police prior to scheduled rallies. (A. 6a). None of the court orders set any limits on the items that could be seized. (A. 9a).

without resort to mass frisking. (Tr. 85-86, 90-93, 99-103, 113, 163-64, 297, 1056-58). There was no evidence offered at trial that mass searches of persons and cars have been used elsewhere in this country to control crowds at political demonstrations. *Id.* Confidential documents from the Connecticut State Police Department (CSPD) reflect that CSPD has studied the police response to Klan rallies in other jurisdictions and has conceded that "a high police profile was effective in keeping opposing groups of demonstrators under control with a minimum of injuries." (Ex. 55, 76, 106).

7. The District Court found that the police response to the first three Klan rallies was woefully inadequate, i.e., insufficient number of police officers, inadequate deployment of officers, and a lack of separation between Klan supporters and anti-Klan demonstrators. (A. 11a-12a) The problems in maintaining order at the first three rallies were the direct result of bad police work. *Id.* For example, at the second Klan rally in Connecticut, fifty police officers were assigned to control a crowd of twenty-one Klan members and 1,500 to 2,000 demonstrators. (A. 11a). Injuries occurred at the first three rallies notwithstanding mass searching at two of these rallies. (A. 12a). CSPD officers have candidly acknowledged the initial deficiencies, explaining that they had had no previous experience or training in maintaining order at such demonstrations and that the early rallies were learning experiences. (A. 12a)(Tr. 877-79, 1053-54, 1064-67, 1082-83, 1111-13, 1132-33, 1529, 1607, 1662-64, 1695).

8. The District Court found that police performance improved markedly at the thirteen subsequent

rallies. (A. 12a). Order was successfully maintained at these rallies because the police effectively implemented traditional crowd control tactics; i.e., a large and visible police presence and the separation of opposing groups. (A. 12a).

9. The District Court found that the weapons used by anti-Klan demonstrators at the three initial Klan rallies were fists, rocks, bottles and sticks. (A. 10a) The injuries suffered at these rallies were essentially such as would be sustained in a fight. (Stipulations hereafter "Stip." 9k, 10h, 11h) (Tr. 175-176, 819, 1052-53, 1062-63). The reference in the Certiorari Petition to "liquid bottle bombs, fiberglass knives, plastic grenades, and other plastic explosives" is a pure fiction. (Certiorari Petition, hereafter "Pet." 11). There is no suggestion in the trial record that any person who has or might attend a Klan rally in Connecticut has brought such items to a rally, has contemplated the use of such items, or has access to such items.

10. There were no explicit, neutral criteria to guide police discretion as to whether to conduct mass searches, the intensity of the searches, and the items that warranted confiscation. (A. 8a-9a). As a result, the record is replete with examples of arbitrary police conduct. *Id.* For example, police used magnetometer searches at some rallies and frisks at other rallies for no apparent reason. (A. 8a-9a). At some rallies, certain persons were searched and certain persons were frisked by magnetometer for no reason. (Tr. 37, 761-62, 273-75)(Ex, 226). At several rallies, persons were frisked more than once for no reason. (A. 8a). At some rallies, police dismantled cars, searching under the

hoods and inside passenger compartments, glove compartments, trunks, air filters and hubcaps. (A. 9a)(Tr. 601-602). Moreover, the items that were confiscated at rally sites ranged from rocks, knives, and baseball bats to cameras, credit cards, change purses and an apple. (A. 9a).

REASONS FOR DENYING THE WRIT

1. Petitioners Do Not Challenge the Legal Conclusions of the Court Below; Instead They Seek a Redetermination of the Facts.

This case does not present any dispute concerning legal principles. The governing Fourth Amendment standards have been well settled by this Court, were properly identified by both courts below, and are accepted by petitioners. Petitioners' grievance is with the factual findings of the District Court. However, this Court does not sit as a "super trial court" to review findings of fact, particularly where those findings were substantially affirmed by the Court of Appeals.

The "*central teaching of . . . Fourth Amendment jurisprudence*" is that privacy intrusions cannot be tolerated in the absence of objective evidence that a particular person is engaged in wrongdoing. *United States v. Cortez,* 449 U.S. 411, 418 (1981) (emphasis in original), *citing Terry v. Ohio,* 392 U.S. 1, 21, n. 18 (1968). *See also Ybarra v. Illinois,* 444 U.S. 85, 91-96 (1979). It is well-settled under the Fourth Amendment that a search conducted without a warrant issued upon probable cause is "*per se* unreasonable . . . subject only to a

few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973) *citing Katz v. United States,* 389 U.S. 347, 357 (1967).

These exceptions are properly limited in scope and this Court has been openly reluctant to expand them. *United States v. Chadwick,* 443 U.S. 1 (1977); *United States v. Ramsey,* 431 U.S. 606 (1977). This Court recently stated that "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal and where 'other safeguards' are available 'to assure the individual's reasonable expectation of privacy is not subject to the discretion of the officer in the field.' " *New Jersey v. T.L.O.,* 469 U.S. 325, 342, n. 8 (1985), *citing Delaware v. Prouse,* 440 U.S. 648, 654-55 (1979).

This Court has assessed whether suspicionless search schemes satisfy the test of reasonableness under the Fourth Amendment by "balancing . . . the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979). *See Tennessee v. Garner,* 471 U.S. 1, 7-8 (1985). The factors that a court must consider in undertaking this inquiry include "the scope of the particular intrusion, the manner in which it is conducted, the justification for initating it, and the place in which it is conducted." *Bell v. Wolfish, supra,* 441 U.S. at 559.

The District Court correctly applied the *Wolfish* test in assessing the mass frisk scheme. The District Court found, as a matter of fact, that order can be

maintained at Klan rallies without the need to conduct mass frisks. (A. 12a-13a). The Court of Appeals carefully reviewed the trial record and concluded that this finding was not clearly erroneous. (A. 59a-60a, n. 14, 62a). The District Court also found that mass frisks of all persons attending political rallies constitute a substantial intrusion on individual privacy rights. (A. 16a-18a). Again, the Court of Appeals determined that this finding was not clearly erroneous. (A. 56a, 58a-60a). The intrusiveness of the mass frisk scheme is also substantiated by the case law which reflects that no court has ever held that a person other than a convict may be subjected to a search as intrusive as a frisk in the absence of individualized suspicion. (A. 17a).[2]

Contrary to petitioners' suggestion, the lower courts struck a careful accommodation between security needs and individual privacy rights; an accommodation which accounts for every plausible threat to public safety at Klan rallies. Pursuant to the decision below, police agencies may separate opposing political groups beyond a throwing distance, thereby precluding fist fights within the rally site and deterring the throwing of projectiles. The possession of firearms may be declared illegal and persons may be frisked where there

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[2] *Compare Delaware v. Prouse, supra,* 440 U.S. 648 (approving car stops); *United States v. Albarado,* 495 F.2d 799 (2d Cir. 1974) (approving magnetometer searches) *with United States v. Ortiz,* 422 U.S. 891 (1975) (invalidating mass car searches); *Ringe v. Romero,* 624 F.Supp. 417 (W.D. La. 1985) (invaliding mass frisks).

is individualized suspicion of illegal possession.[3] All persons attending the rally may be searched by a metal detector where there is specific evidence that a rally will be attended by an opposition group that has historically clashed with the rally sponsor and there is specific evidence of a likelihood of violence, thereby eliminating the possibility that firearms or knives could be present within a rally site.[4]

Given the wealth of evidence supporting this careful judicial balance, the decision below could only be reversed by an act of *de novo,* appellate fact finding.[5] This Court has repeatedly eschewed that role.

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts . . . would very likely contribute only negligibly to the accuracy of fact determination at a

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[3] Plaintiffs did not challenge the legality and appropriateness of a ban on weapons at any time in this litigation.

[4] The balance struck by the lower courts reflects careful consideration for the precedential implications of sanctioning a mass frisk scheme. If the courts were to approve mass frisks at a political rally despite a finding that such searches were unnecessary for purposes of maintaining public safety, mass frisk schemes would proliferate at political rallies given that the risk of violence at such events is often significant. (A. 11a) (Tr. 85-86, 90-93, 99-103, 113, 163-164, 297).

[5] In resolving credibility issues, the District Court was privy to live testimony and to police video tapes of the significant Klan rallies.

> huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade . . . more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be 'the main event' . . . rather than a 'tryout on the road'. . . ."

Anderson v. City of Bessemer City, 470 U.S. 564, 574-85 (1985). *See Goodman v. Lukens Steel Co.,* 107 S.Ct. 2617, 2623 (1987) ("A Court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error . . . Unless there are one or more errors of law inhering in the judgment below . . . , we should affirm it.").[6]

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[6] Petitioners argue that the lower courts did not accord sufficient deference to the views of state police officers. (Pet. at p. 12, n.7) This claim is without foundation for several reasons.

> 1. In finding that mass frisks were not needed to maintain order, the trial court relied heavily on the testimony of certain state police officers who were field commanders and intelligence operatives at Klan rallies. (A. 12a). These officers acknowledged that the violence at the initial rallies was a function of police tactical

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Petitioners claim that certiorari is warranted because they have identified a novel law enforcement problem that is without guidance from the law or from the literature and practice of police science. Nothing is further from reality. The Court of Appeals decision authorizing metal detectors removes firearms and knives as issues. What remains for this Court's consideration are fists, sticks, and stones. Unfortunately, there is a long history in this country of the use of such instrumentalities at political rallies. There was detailed testimony at trial concerning the clashes of opposing groups at rallies in Washington, D.C. relating to the Camp David accords, the overthrow of the Shah of Iran, and the taking of American hostages by Iran. (Tr. 90-93, 99-103, 163-64). The memories of anti-Vietnam War demonstrations, civil rights marches in the

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errors. (Tr. 877-79, 1053-54, 1064-67, 1082-83, 1111-13, 1132-33, 1529, 1607, 1662-64, 1695.) They attributed these errors to a lack of prior training and experience. *Id.*

2. In determining that the availability of metal detectors obviated the need for mass frisks, the Court of Appeals relied on the fact that police agencies in Connecticut had unilaterally decided to use metal detectors in lieu of mass frisks at two rallies and that these rallies were conducted without incident. (A. at 47a, 60a.).

3. The trial record includes internal police documents which reflect the views of state police officers that order had been successfully maintained at out of state Klan rallies by the use of traditional police tactics and without resort to mass searching. (Ex. 55, 76, 106).

South, and labor strikes are etched in our collective consciousness. The trial record is unambiguous that law enforcement agencies have developed extensive and effective methodologies for responding to fists, sticks, and rocks at such events.[7] None of these time-proven approaches contemplates massive intrusions into free speech and privacy rights.

This case does not raise any legal issue for this Court to resolve, let alone a "novel" legal issue. Accordingly, the petition for certiorari should be denied.[8]

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[7] The Certiorari Petition erroneously claims that the Court of Appeals did not consider the security risks posed by rocks, sticks and bottles. (Pet. 14). To the contrary, the Court of Appeals stated that these threats can be adequately addressed by traditional crowd control techniques; i.e., "adequate police, separation of hostile groups, site selection, and preparation, etc." (A. at 62a).

[8] Petitioners imply that there is a conflict between the Federal Courts on the one hand, and certain Connecticut State Courts, on the other hand, as evidenced by the twelve court orders purporting to authorize mass frisks. (Pet. 12). The notion of a conflict is illusory. Only in regard to one court order, Stratford, did a state court address any of the constitutional issues posed at bar. (Ex. 131). The fact that First and Fourth Amendment issues were not decided in the state courts reflects Petitioners' decisions to wait until the last minute before a rally to file their state court suits. (A. 6a). *See Wilkinson I, supra,* 591 F. Supp. at 412, n. 10. As the District Court noted, the resulting lack of notice precluded Defendants from challenging these court orders on constitional grounds or, for that matter, on any grounds. *Id.* at 412. Moreover, as with all of the state court proceedings, the testimony of the state police officers at the Stratford hearing

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2. Petitioners' Version of a First and Fourth Amendment Nexus is Contrary, On Its Face, to the Values Underlying the First and Fourth Amendments and Therefore Does Not Warrant Plenary Consideration.

Petitioners contend that mass frisks at rallies would provide enhanced security and thereby promote free speech rights (Pet. 9-12). Petitioners' thesis finds no support in the trial record and is at war with the history and objectives underlying the First and Fourth Amendments.

Both in England and this country, the power to search has historically been used as a means of suppressing unpopular speech. *See Entick v. Carrington,* 19 How. St. Tr. 1029 (1765); *Wilkes v. Wood,* 19 How. St. Tr. 1153 (1763). *E.g., Marcus v. Search Warrants,* 367 U.S. 717 (1961) (use of search and seize power to seize allegedly "obscene" materials); *United States v. McSurely,* 473 F. 2d 1178 (D.C. Cir. 1972)(use of search and seizure power to suppress political dissent); *Manfredoni v. Barry,* 401 F. Supp. 762 (E.D.N.Y. 1975) (same); *Lykken v. Vavreck,* 366 F. Supp. 585 (D. Minn. 1973) (same); *Farber v. Rizzo,* 363 F. Supp. 386 (E.D.

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deviated substantially from the police documents and the police testimony that are part of the record in the case at bar. (Tr. 132-34, 195-96, 813-19, 1110-13). For instance, police witnesses never informed the state courts that faulty police work had been employed at the rallies where there was violence. *Id.* The record at bar also differs from those in the state courts given the opportunity in this case to elicit expert testimony and to secure police documents and videotapes through discovery.

Pa. 1973) ((same). *See also Boyd v. United States,* 116 U.S. 616 (1886). As this Court has stated:

> "Historically, the struggle for freedom of speech and press in England was bound up with the issue of the search and seizure power." *Marcus v. Search Warrants,* 367 U.S. 717, 724 (1961). History abundantly documents the tendency of Government–however, benevolent and benign its motives–to view with suspiciion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs . . . The price of public dissent must not be a dread of subjection to an unchecked surveillance power.

United States v. United States District Court, 407 U.S. 297, 313-14 (1972).

The trial record substantiates the Court's traditional concern. The District Court found that large numbers of persons who had traveled to Klan rally sites had decided not to attend the rallies rather than be subjected to frisks. (A. 9a-10a). One police officer observed "several hundred persons leave [a] rally site rather than be subjected to a frisk". (Ex. 118, 128, 149). Confidential state police documents reflect that a prime purpose of the mass frisks was to deter persons from attending the Klan rallies. (Ex. 55, 73 at p. 21) (Tr. 1664-65).

Under Petitioners' logic, any intrusive law enforcement tactic which enhanced security at a potentially volatile political demonstration would automatically be valid, regardless of its impact on First Amendment

Rights. Because virtually any intrusive police technique will in fact add to security, Petitioners' thesis is nothing more than the equivalent of stating that First Amendment protection should not apply to public protests and demonstrations. It does not warrant plenary consideration by this Court.[9]

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[9] Petitioners seek exemption from traditional First and Fourth Amendment doctrines by invoking the labels "administrative searches" and "voluntary searches". Petitioners claim that because the mass frisks are not intended to investigate crime, they are "administrative" and should be subjected to a lesser standard of scrutiny. This Court has repeatedly rejected this claim, noting that it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *New Jersey v. TLO, supra,* 469 U.S. at 335, quoting, *Camara v. Municipal Court, supra,* 387 U.S. at 530. *See Delaware v. Prouse, supra,* 440 U.S. at 662. *See also* the District Court's analysis at A. 22a-24a.

Petitioners label the mass frisks as "voluntary" because persons can leave the rally site rather than undergo a search. As a price for this so-called "voluntary" choice, persons must forfeit their First Amendment right to attend a political gathering. It has long been settled that government may not condition access to a gratuitous privilege, let alone to a constitutional right, upon the sacrifice of another constitutional right. *Frost v. Railroad Commission,* 271 U.S. 583, 593-94 (1926). *See e.g., Perry v. Sindermann,* 408 U.S. 593, 598 (1972); *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Blackburn v. Snow,* 771 F. 2d 556, 567-69 (1st Cir. 1985); *United States v. Albarado, supra,* 495 F. 2d at 806-807.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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